LIBRARY
SUPREME COURT, U. S.
APPENDIX

Supreme Court, U
FILE
JUL 17 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

70-96

No. ~~1454~~

PHILIP J. PICARD,
PETITIONER,

v.

JAMES J. CONNOR,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FILED MARCH 10, 1971

CERTIORARI GRANTED MAY 3, 1971

TABLE OF CONTENTS

	Page
Docket entries in the Court below	1
Opinion in the Court below	4
Judgment of the Court below	11
Docket entries for the U.S. District Court	12
The Petition for Habeas Corpus	17
The Respondent's Return	28
The Petitioner Connor's Memorandum of Law and Fact	31
Opinion of the Federal District Court	50
The Order of Dismissal	57
The Massachusetts docket entries	58
The Massachusetts indictment	71
The Motion to Amend	73
The Warrant	74
The Order and Notice Required by General Laws c. 277 §65	76
The Transcript Wherein the Motion To Substitute The Respondent's Name Was Allowed	78
The Arraignment Transcript Dated August 13, 1965	80
The Respondent's State Court Motion to Quash Based On The Indictment	86
The Respondent's State Court Motion to Dismiss Based On The Indictment	88
Transcript of An Argument With Regard to the Indictment, Dated September 15, 1965	90
The Opinion of the Supreme Judicial Court of Massachusetts	112

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

No. 7537

JAMES J. CONNOR,
PETITIONER,

v.

PHILIP J. PICARD,
as he is Superintendent of the
Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

DOCKET ENTRIES

PROCEEDINGS	
1970	
Feb. 12	Record on appeal in one volume filed and case docketed.
Feb. 24	Appearance of James J. Twohig for appellant filed. Motion filed. Order (Aldrich, Ch.J.) enlarging the date for filing statement and designation to and including April 21, 1970. Notice mailed.

1970

Feb. 25 Appearance of Lawrence P. Cohen, for the appellee filed.

Apr. 21 Statement and designation filed. Motions filed. Order (Aldrich, Ch.J.) granting leave to the parties to proceed on the original papers without reproduction in appendix form. Order (Aldrich, Ch.J.) enlarging the time for filing brief for appellant to and including May 21, 1970. Notices mailed.

May 21 Motion, assented to, filed. Order (Aldrich, Ch.J.) enlarging the time for filing brief for appellant to and including May 28, 1970. Notices mailed.

May 28 Typewritten brief for appellant filed.

June 23 Brief for appellee filed.

Aug. 31 Assigned for hearing at the coming September 1970 session.

Sept. 11 Heard before Aldrich, McEntee and Coffin, JJ

Sept. 22 Supplemental memorandum filed by respondent pursuant to leave granted at oral argument.

Dec. 10 Judgment: The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth. No costs. Opinion by Aldrich, Ch. J. Notices mailed.

Dec. 31 Mandate issued; copy filed. Original papers returned to the district court.

1971

Feb. 12 Motion to recall mandate etc., filed. Order (Murray, D.J.) recalling mandate and staying District Court order until further order of this Court. Notices mailed.

Feb. 15 Memorandum and Order (Aldrich, Ch.J.) remanding the matter to the District Court with various directions and ordering mandate to reissue forthwith. Mandate reissued. Notices mailed.

Feb. 24 Certified copy of proceedings to Supreme Court. Notices mailed.

Mar. 15 Notice of filing petition for certiorari (3/10/71) filed. [No. 1454]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537

JAMES J. CONNOR,
PETITIONER, APPELLANT,
v.
PHILIP J. PICARD,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE AND COFFIN, *Circuit Judges*.

James J. Twohig for appellant.
Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *Garrett H. Byrne*, District Attorney, Suffolk County, were on brief, for appellee.

December 10, 1970

ALDRICH, *Chief Judge*. A Massachusetts grand jury indicted Donald Landry, three other named defendants, and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," in connection with the killing of one Robert Davis. Subsequently petitioner Connor was found in Landry's apartment and arrested. On motion presented to the Superior Court by the district attorney, the following order was entered over petitioner's objection.[1] "Court having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name

[1] We make note of the objection because we are not to be taken as intimating that a Massachusetts defendant cannot waive what we herein hold is his right to be properly indicted.

of James J. Connor to be entered on the record." This procedure was authorized by a Massachusetts statute, Mass. G.L. c. 277, § 19.[2] Petitioner was arraigned on the indictment. After unsuccessful attempts by him to inspect the grand jury minutes to ascertain whether there was evidence implicating him in the killing, the case went to trial and petitioner was convicted of first degree murder. His state appeal challenging, *inter alia,* the validity of the indictment, failed. *Commonwealth* v. *Doherty,* 1967, 353 Mass. 197 (two justices dissenting). He then brought a habeas corpus petition in the district court and, when he failed there as well, this appeal followed.

Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his state remedy, citing *Needel* v. *Scafati,* 1 Cir., 1969, 412 F.2d 761, *cert. denied* 396 U.S. 861, and *Subilosky* v. *Commonwealth,* 1 Cir., 1969, 412 F.2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel,* nor precedent, as in *Subilosky,* that were not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *United States ex rel. Kemp* v. *Pate,* 7 Cir., 1966, 359 F.2d 749, 751; *cf. Wilbur* v. *Maine,* 1 Cir.,

[2] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by another practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment." Mass. G.L. c. 277, § 19.

1970, 421 F.2d 327. That is enough to satisfy the requirements of the exhaustion of the doctrine. *Sullivan* v. *Scafati,* 1 Cir., 1970, 428 F.2d 1023, 1024 n. 1. We therefore turn to the merits.

The Commonwealth's initial brief asserts that ". . . properly viewed, petitioner's sole argument is no more than one that there was insufficient evidence before the grand jury showing that petitioner was Landry's accomplice. Such a claim, however, does not warrant judicial review. [Citations omitted.] There are sound policy reasons underlying the rule that an accused cannot challenge the sufficiency of the evidence before the grand jury." This misstates the issue. Petitioner is not challenging the validity of the grand jury determination. On the contrary, the grand jury itself has said that there was insufficient evidence to indict him, and we accept that as true. *See Commonwealth* v. *Gedzium,* 1927, 259 Mass. 453, 458. The question is whether, since the jury concededly did not find probable cause, petitioner has a constitutional complaint. We assume there is no general due process right to require that prosecution be preceded by an indictment. *Lem Woon* v. *Oregon,* 1913, 229 U.S. 586; *Hurtado* v. *California,* 1884, 110 U.S. 516; *see Beck* v. *Washington,* 1962, 369 U.S. 541, 545; *cf. Ocampo* v. *United States,* 1914, 234 U.S. 91. The issue is whether, in view of the extent to which Massachusetts affords this protection to others, the procedure by which petitioner was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws.

The Massachusetts court has defined the requirements of the Commonwealth's Constitution.

> "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until the ineriminating evidence has been laid before a grand jury, and they have found probable

cause, at least, to believe the facts true on which the criminality depends."

Commonwealth v. *Holley,* 1855, 3 Gray 458, 459 (Shaw, Ch. J.).

Because of this requirement, Massachusetts indictments are, with the possible exception of the John Doe procedure, amendable only with respect "to matters of form and not as to matters of substance." *Commonwealth* v. *Snow,* 1930, 269 Mass. 598, 606.[3] In sustaining the present statute in 1927, the Massachusetts court acknowledged that legislative authority to interfere with the protection of the grand jury system was limited to "minor details or unessential formalities." *Commonwealth* v. *Gedzium,* ante at 459. It justified the procedure by stating, without elucidation, that the addition of the defendant's name was neither an amendment, nor completing an indictment "in blank." Id. at 457, 461.

We are not concerned with the soundness of the conclusion that the John Doe procedure is not in conflict with the Massachusetts Declaration of Rights, but we are concerned with its consequences. There can be no doubt as to the substantiality of the loss to a defendant of the protection afforded by a requirement that there must be an indictment before he can be brought to trial. The grand jury is "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *Ex parte Bain,*

---

[3] *Compare Commonwealth* v. *Cooper*, 1928, 264 Mass. 378 (arson; words "wilfully and maliciously" cannot be added) *and Commonwealth* v. *Snow*, ante (extortion; identity of person threatened cannot be changed), *with Commonwealth* v. *DiStasio*, 1936, 294 Mass. 273 (murder; true name of victim designated as "John Doe" can be attached where indictment alleged date and place of commission of crime). *See also Commonwealth* v. *Crotty*, 1865, 10 Allen 403.

1887, 121 U.S. 1, 11. Nor can we doubt that petitioner was denied that protection. Entering a defendant's name on the record could be termed a matter of form only if the grand jury had already sufficiently described him so that adding the true name was, in fact, only a formal matter.[4] Absent such identification, the court's assertion in *Gedzium* that there was no reason to suppose that the grand jury "did not have in mind a particular person," 259 Mass. at 460, might, with due respect, be termed sophistical. Of course the jury had in mind a particular person, viz., the person who committed the crime. It had nothing in mind, however, to indicate the criminality, to use the court's word in *Holley,* of the petitioner. We must agree with the view of the dissenting justices in petitioner's case. *See* 353 Mass. at 216-18. Petitioner faced trial not as the result of a determination of his criminality by the grand jury, but because, relying on the special statutory procedure, the jury delegated this decision to others.[5]

We come, then, to the question: whether there is adequate justification for the difference in treatment Massachusetts accords defendants like petitioner and those who are brought to trial on regular indictments. If the difference is to withstand constitutional scrutiny it must be based upon classifications which, at a minimum, are rationally

---

[4] In *Commonwealth* v. *Crotty*, 1865, 10 Allen 403, the Massachusetts court suggested that if the document—there a warrant—although using a fictitious name, described the defendant's "occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified," it might be "sufficient to indicate clearly" who was intended. Id. at 405.

[5] We may observe that under the Massachusetts John Doe practice not only is it never established that any newly discovered evidence relied upon by the prosecuting attorney in naming a defendant would have been sufficient to persuade the grand jury, there appears to be no obligation on his part to produce any new evidence at all. So far as the statute provides, he is apparently at liberty merely to conclude that the grand jury was over-cautious in rejecting what he originally presented.

related to a permissible state purpose. *See, e.g., Walters* v. *City of St. Louis,* 1954, 347 U.S. 231; *Skinner* v. *Oklahoma ex rel. Williamson,* 1942, 316 U.S. 535; *Lindsley* v. *Natural Carbonic Gas Co.,* 1911, 220 U.S. 61. The Commonwealth has suggested only one justification for its procedure. The court in *Gedzium* said, at 461,

> "[T]he grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and his identifying characteristics so that no adequate description of him can be given when his definite existence as a human being is disclosed and established."

Having in mind that in *Gedzium,* as here, there was no indication that the actor had used any form of disguise, the court's rhetoric is merely a euphemism for the absence of evidence. A more frank, though obviously less palatable, statement of its position would be that while, where the actor is known to the grand jury, he cannot be charged unless it finds the evidence against him sufficient; if he is not known because, like criminals generally, he has neglected to reveal his identity, this relieves the Commonwealth of the necessity of obtaining any grand jury finding of cause.

As the basis for classification, the *Gedzium* rationale is not even minimally persuasive. Even if it should appear that the actor made a deliberate attempt to "hamper" the grand jury, to say that conduct on his part justifies the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant bridges the very question at issue. One might equally say that a robbery defendant should not be allowed to assert inability to afford counsel in view of all the money he stole.

We see no end served by the statute except prosecutorial convenience. However, the Commonwealth properly does not argue that the mere fact, for no definable reason — whether deliberate, fortuitous, or inadvertent — it sought an indictment before it had sufficient basis for one, should relieve it of the necessity of returning to the grand jury when it had a better case. As a ground for distinguishing between defendants, this is clearly inadequate. *See* Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065, 1081 (1969).

With all deference, the Massachusetts court has approved a procedure similar to the one it condemned in *Commonwealth* v. *Crotty,* n. 4 ante, as comparable to the detested pre-Revolutionary general warrant. It is no better merely because the delegation was made by a grand jury rather than by a magistrate. In the light of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination.

The judgment of the district court dismissing the petition is vacated. The case is remanded with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537.

JAMES J. CONNOR,
PETITIONER, APPELLANT,

v.

PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT, APPELLEE.

JUDGMENT

Entered: December 10, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth. No costs.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Twohig and Quinn.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Misc. Civil No. 68-88-G

JAMES J. CONNOR,
PETITIONER,

v.

PHILIP J. PICARD, Superintendent,
Massachusetts Correctional
Institution, Norfolk,
RESPONDENT.

DOCKET ENTRIES

PROCEEDINGS

1968		
Dec.	10	Petition for a Writ of Habeas Corpus filed. Copy mailed to Atty. Gen., Mass.
	20	Order of Notice entered.
	24	Respondent's return filed.
1969		
Mar.	11	Marshal's return of order of notice with service on Dec. 20, 1968, filed.
May	1	Appearance of Edward W. Hanley, II, Asst. Atty. General, for Deft., filed.
June	13	GARRITY, J. ORDER SCHEDULING & LIMITING HEARING, ENTERED. Hearing on June 23rd at 2:30 P.M. Copies to counsel.
	23	Motion for continuance, filed and Assented to. GARRITY, J. On Motion for Continuance, "Allowed — Continued to 7-8-69 at 10 A.M." Copy to both counsel.
July	7	GARRITY, J. ORDER TO PRODUCE. Cert. Copy to Social Law Library; Copies to Messrs. Twohig and McNeil.

1969

8 GARRITY, J. After hearing on Petition for Habeas Corpus, ADVISEMENT. Briefs due in 4 weeks — Aug. 11th; Reply briefs due Aug. 18th. Petitioner's motion for continuance, filed. Pauper affidavit filed by Petitioner. Appearance of Bruce McNeil, Asst. Atty. Gen., filed in Court.

8 GARRITY, J. On petitioner's motion for continuance in part, "After hearing, denied as to paragraph 2; as to paragraphs 6 and 7, allowed to extent that points may be incorporated in brief to be filed by petitioner on or before 8-11-69." Application to proceed in Forma Pauperis, filed and Allowed by the Court.

Aug. 11 Defendant's Brief, filed with c/s.

11 Plaintiff's Memorandum of Law and Fact, filed.

1970

Jan. 19 GARRITY, J. OPINION dated January 16, 1970, FILED. Copies to counsel, and West Publishing.

20 GARRITY, J. ORDER OF DISMISSAL, ENTERED. Copies to all counsel.

Feb. 9 Petitioner's application for Certificate of Probable Cause, filed with c/s.

9 Petitioner's Claim of Appeal, filed with c/s.

10 GARRITY, J. ORDER THAT CERTIFICATE OF PROBABLE CAUSE ISSUE, ENTERED. Copies to Messrs. Twohig and McNeil.

12 Original pleadings delivered to the court of appeals.

Dec. 10 Opinion from the court of appeals entered.

15 Plaintiff's Motion for Bail.

31 Mandate from the court of appeals entered. "The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with in-

1970

structions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the commonwealth." No costs. Original pleadings returned from the court of appeals.

1971

Jan. 5 GARRITY, J. ORDER FOR HEARING ENTERED. . .Court will hear the parties on January 11, 1971 at 2:00 o/clock with respect to plaintiff's motion and as to a reasonable deadline for the Commonwealth's Indicting the plaintiff. Copies to Messrs. Twohig, McAuliffe and Attorney General's Office.

11 GARRITY, J. After hearing, court ORDERS that Commonwealth has until Friday, February 12, 1971 to indict the defendant if it so chooses; defendant's Motion for Bail, DENIED.

11 GARRITY, J. ORDER CONDITIONALLY GRANTING HABEAS CORPUS ENTERED. . .after hearing pursuant to mandate of the Court of Appeals dated December 31, 1970, it is ordered that the writ of habeas corpus sought by the plaintiff herein issued unless the plaintiff is indicted by the Commonwealth on or before February 12, 1971. cc/cl.

Feb. 11 Motion for Stay or Bail filed by Respondent with c/s.

11 GARRITY, J. re Motion for Stay or Bail — "DENIED, for the reason that the action sought by the movant is beyond the court's authority under the mandate of the Court of Appeals dated 12/31/70". cc/cl.

16 Certified copy of Order Of Court entered Feb. 12, 1971 received from the Court Of Appeals entered. It is ordered that the mandate of this Court of December 31, 1970, be, and the same

1971

hereby is, recalled and It is further ordered that the order of the District Court of January 11, 1971, be, and and same hereby is, stayed until further order of this Court.

16 Memorandum and Order Entered February 15, 1971 received from the Court of Appeals. The courtupon receipt of the Commonwealth's Motion to recall mandate and impose bail issued a temporary "hold" order of February 12 because of the shortness of time. It now addressed itself to the substance of the motion. It might seem that the Commonwealth could have determined in less than two months whether it wanted to petition for certiorari. On the other hand, we do not agree with the district court, if that was its ruling that it did not have power to extend the February 12 indictment cutoff within our order specifying a reasonable time. The commonwealth's decision to seek certiorari has a direct bearing on this subject.

The matter is remanded to the district court with the following instructions:

1. The February 12 date set in its order of January 11 is extended to Feb. 24.
2. If the district court believes in the interest of justice, that this date should be further extended, it has power to do so.
3. If the district court is of the opinion that the defendant should be released on bail pending the filing of a petition for certiorari, or afterwards, it has power to do so, subject to review by this court.

Feb. 16 It is further ordered that mandate reissue forthwith.

1971

18 GARRITY, J. Hearing held and further hearing scheduled for Thurs. Feb. 25, 1971 at 4:00 P.M.

19 GARRITY, J. ORDER EXTENDING TIME WITHIN WHICH PETITIONER MAY BE INDICTED ENTERED. it is ordered that the time within which the Commonwealth may seek an indictment of petitioner from a grand jury is hereby extended until the date (Probably March 10, 1971) by which the Commonwealth must file a petition for certiorari in the Supreme Court of the United States.... Further hearing on the question of bail is hereby scheduled for 2/25/71 at 4:00 P.M. cc/cl.

19 Motion for Writ of Habeas Corpus Ad Testificandum FILED with c.s,

22 GARRITY, J. re Motion for Writ of Habeas Corpus — ALLOWED". CC/CL.

22 Writ of Habeas Corpus issued to U. S. Marshal returnable 2/25/71.

25 GARRITY, J. hearing re Bail — after hearing, petitioner's motion for allowance of bail — DENIED.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

Civil Action 68-88-G

JAMES J. CONNOR,
PETITIONER
v.
PHILIP J. PICARD,
Superintendent Massachusetts
Correctional Institute

PETITION FOR WRIT OF HABEAS CORPUS

December 18, 1968

Your petitioner, James J. Connor, now presently confined in Massachusetts Correctional Institution, Norfolk, in the custody of Philip J. Picard, Superintendent of said institution, in the Town of Norfolk, in the Commonwealth of Massachusetts, respectfully represents that:

(1) Your petitioner, a citizen of the United States, having been born in Boston, in the said Commonwealth, and resided there throughout his life, is now unjustly and unlawfully restrained of his liberty and detained under the authority of the said Commonwealth in said institution.

(2) Your petitioner is thus held and deprived of his liberty by virtue of a conviction of the Superior Court of Suffolk County of the said Commonwealth on the twenty-sixth day of March A.D. 1966, and a commitment issued thereunder. A copy of this instrument marked Exhibit "A," being page 2 of the record of the trial court containing the docket entries, is hereby incorporated by reference.

(3) Your petitioner has exhausted his remedies in the courts of the said Commonwealth, having duly appealed to the Supreme Judicial Court of the said Commonwealth where the judgment against your petitioner was affirmed.

A copy of the decision of the Supreme Judicial Court, which was handed down on August 22nd, 1967, accompanies this petition, being marked "Exhibit B," including the dissenting opinion of Justice Kirk and Justice Spiegel.

FACTS OF THE CASE

On August 4th, 1965, the Grand Jurors in the County of Suffolk in the Commonwealth of Massachusetts, considering the violent death of one Robert W. Davis, who on May 1st, 1965, had been despatched by a shotgun, returned an indictment on their oath affirming that Davis had been murdered by "Donald E. Landry, otherwise known as Emo Landry, and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." At this hearing before the Grand Jury, testimony was given by a young woman called Betty Moore and a man known as Ronald Hayes, afterwards, at the trial of the case, the only witnesses to identify your petitioner as a principal.

At another session of the same Grand Jury two months previous, in June, 1965, Betty Moore had also testified. On that occasion also, no indictment issued against your petitioner.

A copy of the aforesaid indictment of the defendant Landry marked "Exhibit C" is hereto attached and incorporated by reference.

On August 4th, the date of his indictment, Donald Landry had already been for some time incarcerated in a penal institution on another charge. On August 6th, two police officers went to the apartment of Landry and his wife in Boston. They were permitted to enter and engaged in conversation the persons present, Landry's wife and four of her friends, two men and two women. One of the men was your petitioner, James J. Connor. Both men were finally taken to Boston Police Headquarters where they were held for several hours, and where it was ascertained

by the police that the other man, one William Hoar, had been in prison on May 1st, the date of the homicide. Your petitioner was then taken to Police Division 11 in Dorchester, Boston, and served with a "John Doe" warrant containing the words of the indictment of August 4th and bearing the same date. He was then booked and returned to Headquarters, where he was again questioned. About five hours after his arrest, the petitioner was allowed to telephone for a lawyer. (A copy of the said warrant is hereto attached and incorporated by reference marked "Exhibit D.").

Three days later, on Monday, August 9th, 1962, your petitioner was "indicted" on motion (a copy of which is hereto attached marked "Exhibit E") of the Suffolk County prosecutor by the substitution in the outstanding blank indictment of the words, "James J. Connor," for the words, "John Doe." This was done over the objection and exception of his counsel after brief argument. The amendment was supported only by the prosecutor's statement in two sentences, "At the time the indictment was returned, the District Attorney and the grand jury did not know the name of the defendant. Since the indictment has been returned, we have ascertained the name of the defendant."

No evidence was offered, and no other statements of fact were made tending to prove these assertions.

In March 1966, Betty Moore, at the trial of the case, testified against Connor and stated that she knew him for a considerable time before May 1st, 1965. Ronald Hayes identified Connor as one of the principals in the crime. He also said that he had never met Connor before the crime and never saw him afterward until August 6th at Headquarters, the day of Connor's arrest, and two days after Hayes's appearance before the Grand Jury. As stated above, they were the only two identifying witnesses.

Since Connor was a short, slender, young man, easily described and identifiable from information at Boston Police Headquarters, the inference is inescapable that neither witness connected Connor with the crime before the Grand Jury in any way, and that their lack of testimony was responsible for the blank description and name on the indictment as to the second man charged. But two days later, after Connor had been fortuitously arrested in Landry's apartment (neither Hayes nor Moore was among those present) and taken to Headquarters, where Hayes saw him, Connor's name was put into official connection with the case for the first time by the booking at Division 11.

Betty Moore, pressed on these matters at the trial, declared that she gave a different story to the Grand Jury in August, 1965, from the story she was then giving to the trial jury, and that she had given still another story to the Grand Jury in her testimony in June, 1965.

From August 5th, the day before your petitioner's arrest, the matter was never again referred to the Grand Jury for the consideration of evidence or a change in the sworn statement by the Grand Jury that it did not know and had no description of the second man to be charged with the murder of Robert W. Davis.

At the trial, Hayes testified that he left the scene shortly after the crime with a Luger in his possession, which was one of two carried by the victim Davis that night. He disposed of the Luger by dropping it in a sewer a short distance from the house where Davis was killed, but it was later recovered and put in evidence. No charge was ever brought against Hayes. He testified that he had never spoken with the police before the day in August, 1965, when he was picked up by them and taken to the Grand Jury.

Although Miss Moore had repeatedly testified that she

did not know the victim Davis, there was testimony by her employer at a voir dire, excluded from the trial jury, that he had been robbed by an armed man during her lunch hour on Wednesday, April 28th, three days before the murder, and he was asked to go to Police Division 4 to look at some photographs. On her return from lunch, her employer testified, Miss Moore said that she had noticed some people outside the cashier's cage that morning, and she wanted to go with him to look at the pictures. Her employer picked out a picture of Davis and discussed his resemblance to the robber who had held him up with Betty Moore. The majority opinion of the Supreme Judicial Court of Massachusetts declared that this evidence was admissible, but that the error in excluding it was not reversible. No charge was brought against Miss Moore of any kind based on the events of April 28th or May 1st.

Before he was killed in the early morning of May 1st, 1965, Robert W. Davis, who had two Luger pistols in his possession, threatened to kill William and Janice Doherty (convicted accessories to his murder in this case) and their baby son, in his crib, and at one point held his pistols to the heads of William and the baby at the same time.

On August 13, 1965, the defendant Connor's plea of not guilty was entered.

On August 24, 1965, the defendant Connor's motion to inspect Grand Jury minutes was filed and denied without prejudice. On March 10, 1966, this motion was renewed by leave of Court and was denied.

On September 10, 1965, the defendant Connor filed a motion to quash the indictment and a motion to dismiss the indictment. On September 24, 1965, both of these motions were denied.

On January 17, 1966, the defendant Connor filed a motion for severance. On February 9, 1966, this motion was denied

by the Court. On March 10, 1966, this motion was renewed by leave of Court and was again denied.

A motion for particulars was made on September 8th, 1965, and that part of the motion requesting information relating to the identification of Connor or relevant testimony before the Grand Jury was denied on September 24th. Your petitioner excepted.

This case, together with indictments charging William R. Doherty and Janice M. Doherty with being accessories before and after the fact of the said murder, was tried before Tomasello, J. and a jury in the Superior Court for Suffolk County, beginning on March 14, 1966, and ending on March 26, 1966.

On March 26, 1966, a verdict of guilty was rendered as to each defendant, with the recommendation that a sentence of death be not imposed. On the same day, the defendant Connor was sentenced to imprisonment for life.

The defendant Connor's claim of appeal was filed on March 29, 1966.

The Supreme Judicial Court of the Commonwealth, on August 22nd, 1967, affirmed the convictions, with two justices dissenting. As to Connor, the dissenting justices, in an opinion written by Justice Kirk, said, "In the case against Connor, the judgment should be reversed, the verdict set aside, and the indictment quashed."

ARGUMENT

It is submitted that the petitioner Connor was deprived of his liberty and is now unlawfully held without due process of law for these reasons:

(1) He was brought to trial without indictment or presentment in violation of the Fifth Amendment and of the Massachusetts Constitution, Part I, Article XII, the statutory provisions of Section 19 of Chapter 277 of the General Laws of the Commonwealth of Massachusetts, and of the rule of the common law that an indictment in a capital

case, which, it is contended by your petitioner has never been changed by legislative enactment, forbids any amendment to such an indictment.

It has been the contention of the defendant Connor in this case that his case was never brought to the attention of the Grand Jury, that the matter of the probable cause of his guilt was never considered by them, and that he was never indicted. The indictment itself, presented under oath by the Grand Jurors, bears this out. In it the Jurors swear that the identity of the second man involved as a principal in the alleged murder of Robert W. Davis was unknown to them and that they had no description of him. By the use of the words "John Doe" they could only indicate that they had received information that a second man was involved. "John Doe" is not an alias or a fictitious name in the sense that it was so used by any person. It is not an erroneous name, nor a nickname. It is a legal device for filling a blank, a device which is perhaps justified when accompanied by "any other practicable description," but by itself it does nothing more than fill out the terms of a general or blank indictment or warrant, a modern lettre de cachet, the type of document described by Chief Justice Bigelow in Commonwealth v. Crotty, (10 Allen 403, 404), "upon which any other individual might have been arrested, as being included in the description, as the defendant himself."

The defendant Connor therefore contends that the indictment was a nullity, that the record shows that an amendment was offered by motion and allowed, that this amendment was improper in a capital case, improper and invalid as it was prejudicial to Connor, and ineffective in its attempt to cure a nullity, and that, therefore, the motion should have been denied and the case against Connor, if any, referred to a Grand Jury in accordance with his inalienable right.

(2) Your petitioner was arrested without probable cause and without a warrant on August 6th, 1965. A few hours after his arrest, a warrant based upon the indictment and with identical wording as to lack of description was served upon him while he was still in custody. It is the contention of your petitioner that the warrant was a nullity and that the original arrest could not be validated thereby nor by still another attempt to resuscitate it at the Charles Street Jail on August 11th, 1965, two days after the first appearance of your petitioner's name on the trial court's docket, by the service of still another document upon him in which he was identified by name. A copy of this instrument is hereto attached marked "Exhibit F."

Your petitioner was therefore unlawfully seized and arrested, in violation of the Fourth Amendment of the Constitution, and in violation of Articles XII and XIV of the Massachusetts Constitution, and of this rights under the statutory and common law, and therefore of the Fourteenth Amendment.

(3) Your petitioner was denied a full and fair trial of his case when, on various pretexts, he was repeatedly refused access to testimony which had been given before two sessions of the Grand Jury which had failed to indict him. Both of the witnesses, without whose testimony your petitioner could not have been convicted, had appeared before said body, one of them on two occasions. This latter witness admitted to having told different stories on both occasions. Your petitioner made repeated attempts to obtain information on this testimony, which was essential to the preparation of his defense, by motions, by demands for particulars, by requests during the hearing of pre-trial motions on other matters, and by requests during the trial, especially on the occasion when this witness flatly admitted intentionally telling three different stories under oath.

In the same way, your petitioner was denied a full and

fair trial when his counsel was denied an opportunity to question or confer with material witnesses in the same manner as the prosecution, to which they were constantly available.

(4) The petitioner Connor contends that he has been deprived of a fair rtial by being tried with the co-defendants, William Doherty and Janice Doherty, by reason of the following circumstances.

In the cases against William and Janice Doherty, the District Attorney, pursuant to an order of Court, filed certain "answers to written bill of particulars." These documents set forth a lurid and highly prejudicial tale of the way in which the murder allegedly occurred. They contain much material which could not have been admitted against your petitioner in evidence at trial, and in fact the story therein recounted differs materially from the evidence received under oath at trial. These papers, being in the nature of specifications or particulars, were given to the jury when they retired to deliberate upon their verdicts as to the several defendants. It would hardly be idle speculation to suggest that the jurors, after hearing lengthy oral evidence and having only this version of the facts before them, were influenced by the prejudicial matter therein, and did not consider its inapplicability to the other defendants.

(5) Your petitioner was denied a full and fair trial when the trial court ruled that numerous jurymen were disqualified because they expressed various degrees of repugnance toward the death penalty and varying mental reservations as to its propriety and their will and capacity to impose it, although it was not shown that they could not return a verdict of guilty in some cases, provided they were allowed to recommend that the sentence of death be not imposed; and furthermore, your petitioner's counsel was not accorded the right to examine the veniremen in any reasonable degree.

(6) Your petitioner was denied a full and fair trial when the presiding judge excluded evidence tending to prove the complicity in crime of the aforesaid Betty Moore, the key witness, with the victim, Robert W. Davis, on and before the occasion of his demise, and bearing on the truth of the testimony on identification of your petitioner by the said Betty Moore, an admitted perjurer.

(7) Conversations between the co-defendants Janice Doherty and William Doherty with certain police officers, which were constitutionally inadmissible against them, as they had not previously been advised of their rights, and certain conversations which were alleged to have taken place between them and between other people and them, all in the absence of your petitioner and grievously prejudicial to him, were admitted in evidence by the trial court, over the objection of your petitioner's counsel and after denial of his motion for severance, seasonably made and intended to forestall this double injustice.

The fact that the trial court gave limiting instructions to the jury as to the use of most of this testimony does not alter the fact that Connor was thereby prejudiced. It is clear unrealistic to expect a jury to segregate all of the voluminous evidence perceived in a trial of this length into separate categories of admissibility as to each individual defendant.

WHEREFORE, your petitioner, James J. Connor, prays that:

(A) A writ of habeas corpus issue, directed to the said respondent, Philip J. Picard, Superintendent of Massachusetts Correctional Institution, Norfolk, and commanding him to have the body of your petitioner forthwith before this Honorable Court.

(B) The aforesaid sentence and judgment of your petitioner is vacated.

(C) Your petitioner be delivered from unlawful custody and restraint.

(D) This Court grant and impose such other order, terms, and conditions as it may deem meet and proper.

JAMES J. CONNOR
By his attorney,
JAMES J. TWOHIG

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

RESPONDENT'S RETURN

The respondent makes the following return and for answer to each and every paragraph of the petition for habeas corpus says that:

1. The petitioner is properly in respondent's custody and is under restraint at the Massachusetts Correctional Institution, Norfolk in the Commonwealth of Massachusetts.

2. The petitioner is in the respondent's custody and is under restraint at said institution by virtue of a warrant of commitment, a copy of which is annexed hereto and marked "A".

3. Respondent admits the allegations of paragraph (1), (2) and (3) of the petition in so far as they are allegations of face and not conclusions of law.

PHILIP J. PICARD
Massachusetts Correctional
Institution, Norfolk
Respondent
By his attorney
DAVID C. HAWKINS
Assistant Attorney General

COPY

30 Mar. *Lifer #1*
No. 19494 N 18234
MASSACHUSETTS CORRECTIONAL
INSTITUTION, WALPOLE.
WARRANT VS.
JAMES J. CONNOR
(Illegible)

LIFE

March 26, 1966
To Norf.—9-25-67

MASS. CORRECTIONAL INSTITUTION
WALPOLE
RECEIVED AND COMMITTED
Mar 26 1966
(s) PALMER C. SCAFATI, *Superintendent*

3-26-66 *Life 1st Degree—*
No death pen. imposed

(Illegible) *Death*
(Illegible) *None*

A
Commonwealth of Massachusetts.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Officers of the Court hereinafter named, and the Superintendent of the Massachusetts Correctional Institution, Walpole, in the County of Norfolk.

L.S. GREETING:

Whereas, by the consideration of the Superior Court holden at Boston within and for the County of Suffolk for the transaction of Criminal Business, on the twenty-sixth day of March in the year of our Lord one thousand nine hundred and sixty-six,

JAMES J. CONNOR

now in custody of the Sheriff of said County of Suffolk, convicted of the crime of

Murder in the first degree but the jury recommends that the sentence of death be not imposed,

committed at said Boston, was sentenced to be confined in said Massachusetts Correctional Institution, Walpole, for and during the term of his natural life, and to stand committed in pursuance of said sentence.

WE, THEREFORE, command you, the said Sheriff, Deputies and Officers of said Court, to remove the said James J. Connor from the Jail in Boston in the said County of Suffolk, to said Massachusetts Correctional Institution, Walpole in the said County of Norfolk; and we command you, the said Superintendent to receive the said James J. Connor and immediately thereon to cause the said James J. Connor to be confined therein for and during the term of his natural life.

And for so doing this shall be your warrant; and you said Sheriffs and Officers are to make return of this warrant with your doings thereon to the office of the Clerk of said Superior Court in Boston as soon as may be.

Witness, G. JOSEPH TAURO, ESQUIRE, Chief Justice of said Superior Court, at Boston, this twenty-sixth day of March in the year of our Lord one thousand nine hundred and sixty-six, and sealed with the seal of said Court.

(s) ROBERT P. CONNOLLY

A True Copy,
Attest:

FRANCIS M. MASURET, JR.
Assistant Clerk of
said Superior Court.

A

SUFFOLK, TO WIT: CITY OF BOSTON March 26, 1966

In obedience to the within warrant, I have conveyed the within-named defendant to the Massachusetts Correctional Institution, Walpole, in the County of Norfolk, and delivered him to the Superintendent thereof with a copy of this warrant.

(s) ROBERT P. CONNOLLY
Officer of the Court within named.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Misc. Civil No. 68-88-G

JAMES J. CONNOR,
PETITIONER,

v.

PHILIP J. PICARD, Superintendent, Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

MEMORANDUM OF LAW AND FACT

This memorandum relates to certain reasons, five of the original seven, contained in that part of the Petition of the

Plaintiff entitled "Argument," and being, specifically, the reasons numbered (1), (3), (4), (6), and (7).

(1)

The function of the Grand Jury at common law was the determination of probable cause. *Beavers* v. *Henkel,* 194 U.S. 73, 84.(1904). It provided a barrier for the individual against unjust prosecution by representatives of the sovereign, against charges unfounded on credible testimony or based upon personal malice, zealous ambition, or other unworthy motives. It still provides that barrier where it is permitted to function as it did in this Commonwealth in the time of Chief Justice Shaw and Chief Justice Bigelow and it still has the same purpose. *Costello* v. *U.S.,* 350 U.S. 359, 362. *Hale* v. *Henkel,* 201 U.S. 43, 59.

That purpose is unquestionably a fundamental principle of liberty and justice basic to our system of law. It is recognized even in Hurtado in one of the concluding paragraphs, "Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." *Hurtado* v. *California,* 110 U.S. 516. (1884).

So that it has been recognized without exception that it is the right of individual citizens to be protected against public accusations of infamous crimes, and from the prosecution of public trials, conceived in haste or malice or arbitrary arrogance. *Jones* v. *Robbins,* 8 Gray 329. *Ex parte Bain,* 121 U.S. 1.

Where the right is protected by the Grand Jury and the process of indictment, the fundamental principles of due process must be observed in its administration. As it was

said by Chief Justice Shaw in *Com.* v. *Drew,* 3 Cushing 279, "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the Grand Jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the Grand Jury to return a new indictment, avoiding the defects in the first." (Quoted in Bain.)

In the petitioner's case, the matter had been brought to the attention of the Grand Jury at least twice, in June and August, 1965, and the indictment had been handed up to the Court on Wednesday, August 4th, yet the Court allowed the amendment on motion of the prosecutor only a few days later, on August 9th, without considering its resubmission to the Grand Jury. Counsel for the petitioner Connor objected to the amendment that there was no information on which Connor's name could be substituted, that "John Doe" had been indicted, and no additional evidence which justified Connor being named had been produced.

Implicit in these objections were the contentions that Connor had not been indicted, that Connor was illegally arrested, and that no evidence had so far been adduced justifying Connor being accused, much less indicted.

The Court replied that there was "a perfect defense to the offense, then." The Assistant District Attorney was not asked whether there was in fact reason to hold Connor other than that he had been arrested, whether there had been evidence describing Connor in any way to the Grand Jury, or the circumstances of Connor's arrest. All these were preliminary considerations and not matters to be properly considered at a trial on the merits, although the Court so suggested.

In Massachusetts the method of determining probable cause is the process of indictment by the Grand Jury derived from the common law of England.

Amendment of an indictment under Massachusetts law as to a matter of substance is not permissible. *Com.* v. *Snow,* 269 Mass. 598. (1930).

But an indictment in a capital case cannot be amended in any respect, even with the consent of the defendant. *Com.* v. *Mahar,* 33 Mass. 120.

In the case of *Maxwell* v. *Dow,* 176 U.S. 581, the Supreme Court, speaking of the right of trial by jury and the right to indictment by a Grand Jury, said, "These (rights) are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both."

But this dictum has now been rejected by the Supreme Court in *Duncan* v. *Louisiana,* 20 L Ed 2d 491, 497, 499, in the instance of one of these twin rights, that of trial by jury, the Court in its decision approvingly quoting Blackstone in coupling both of them, "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogatives of the crown."

Since in Massachusetts, the method of preserving the fundamental right protected by the process of indictment has been retained as it was received from the Framers of our Constitution, it must be administered in accordance with the principles pertaining to the Grand Jury as established by the law of the land, i.e., in accordance with due process as created by the common law and adopted by our Constitution. *Ex parte Bain,* 121 U.S. 1, and the cases there cited, especially those of Massachusetts.

In accordance with these principles, since the indictment did not name nor describe the petitioner, it was, as to him, a nullity, and remained so after amendment.

The provisions of G.L. c. 277, s. 19, if constitutional at all after Bain, like the provisions of s. 35A in the same chapter, being in derogation of the common law, must be

strictly construed. But even if they are not so construed, it is impossible to believe that the Legislature intended to authorize the issuance of blank indictments by the use of a subterfuge. The words "John Doe" without more do not indicate a specific person any more than the use of the word "murderer," if used to fill the blank.

(3) (First Paragraph)

Prior to the trial by jury of James J. Connor in the Superior Court of Massachusetts at Boston which commenced on Monday, March 14th, 1966, there were certain pre-trial hearings in the same court which began three days after August 6th, 1965, the date of the defendant's arrest, and continued until March 14th, as follows: August 9th, 1965 (before Chief Justice Tauro); August 13th, 1965 (before Chief Justice Tauro); August 24th, 1965 (before Chief Justice Tauro); September 15th, 1965 (before Justice Paquet); November 4th, 1965 (before Justice Murray); January 17th, 1966 (before Chief Justice Tauro); March 10th, 1966 (before Justice Tomasello), and March 14th, 1966 (before Justice Tomasello). Justice Tomasello conducted the trial.

In addition to the foregoing hearings on motions, there was a hearing on probable cause in the Municipal Court of Dorchester shortly after May 1st, 1965, the date of the homicide, as a result of which William R. Doherty was held on a charge of murder. Doherty was afterwards on August 4th, 1965, indicted as an accessory to the same homicide.

At the hearing if August 13th, 1965, the matter of the grand jury minutes was first discussed, and it was clearly established that the defendant Connor had a particularized need for the minutes not only for the purposes of preparation for trial and for cross examination but also to prove conclusively the defendant Connor was not identified nor considered nor indicted by the Grand Jury. The minutes

were indispensable to the presentation of testimony by Connor at a preliminary evidentiary hearing on dismissal.

This need was developed in an argument on bail which revolved about the facts of the case to that point insofar as they led to certain inescapable conclusions about the grand jury testimony.

The prosecutor referred to the facts of the case which required that Connor be held without bail. Connor's counsel pointed out that no facts had been revealed in this case. He declared that the facts as to identification or lack of identification of the person charged before the Grand Jury had not been disclosed and that there was no description in the possession of the officer making the arrest. He asserted that the same witnesses had appeared before the Grand Jury between May 1st and August 4th, the latter date being that of the blank indictment, and that Connor was not connected with the crime until after his arrest on August 6th. He related in detail the circumstances of the arrest, which he implied was illegal, being without probable cause. He stated among other things that Connor did not attempt to flee from the place of arrest, although he had an opportunity. This was the only fact that the prosecutor denied and he then gave that fact as the ground of his recommendation of no bail. (The denial was not positive, "I wasn't there, but I understand he attempted to flee. Based on these facts (sic), the Commonwealth highly recommends there be no bail.") Connor's counsel then again requested some information from the prosecution justifying anything, bail, arrest, or indictment. The Court then stated justification as follows, "I think the obvious fact is that the grand jury has indicted him for first degree murder." This variant of the colloquial saying, "He must be guilty, or they wouldn't have arrested him," was immediately denied by Connor's counsel, to whom the Court replied in effect that the question of indictment was a mat-

ter for trial, not on a matter for bail. The Court, however, then inquired of the prosecutor for the Grand Jury minutes. The prosecutor replied that they were being typed up, that they hadn't been typed. These minutes related to hearings which had taken place in part at least two months before and had concluded nine days before. The Court then asked the prosecutor as an officer of the Court if he would state that Connor's counsel was in error. Whereupon the prosecutor admitted that counsel for the defendant was right in certain things but did not specify which. As he had previously denied specifically only the statement that Connor did not flee arrest and that very uncertainly, it is obvious that he was aware that the statements of Connor's attorney as to the evidence before the Grand Jury were correct.

The Court then promised to look at the Grand Jury minutes, if that motion was presented.

At the hearing of August 24th the motion for the minutes was presented. The prosecutor commenced with unsupported statements regarding a campaign of "unabashed terror" by the defendants, all of whom were in custody, against the witnesses. The Court asked for some basis. No basis was given except further wild assertions about additional murders and complete terror. The colloquy between the Court and Connor's counsel indicated that the Court had not inspected the Grand Jury's minutes as yet. The motion was denied without prejudice. The Court suggested particulars and specifications and that it could not disregard the statements of the prosecutor made in open court. In this discussion the invalidity of the arrest was brought out, and the circumstances surrounding the arrest and the indictment were again shown to prove the particularized need for the minutes of the Grand Jury. The Court persisted in treating the discussion as an attempt to establish guilt or innocence, while the defendant's coun-

sel repetitiously asserted the irresistible tendency of the known facts to show lack of probable cause for the indictment and the need for the minutes to establish this conclusion beyond the shadow of a doubt.

On September 15th Connor's counsel argued on a motion for particulars (pages 10 to 16) the particularized need of the defendant for certain Grand Jury information to be obtained through the particulars in order to guarantee the defendant his constitutional rights. On all such particulars the motion was denied.

On January 17th Connor's counsel repeatedly requested, in a hearing on a motion to inspect and copy documents, a statement declared by the prosecutor to have been made by a witness as to certain utterances alleged to have been made by Connor at the time of the homicide. Connor's counsel demanded that such a copy of the alleged statement should be given to the defense, implying that the statement had never been uttered before the Grand Jury. (Pp. 3, 4, 5).

At the hearing of February 9th the necessity of the defense for the minutes was argued again by Connor's counsel. (Pp. 20-23). A federal case was cited. *Allis-Chalmers* v. *The City,* 323 Fed. 2d, 233.

At the hearing of March 10th, the motion for inspection of the minutes was renewed, and an exception was taken to its denial. (P. 18).

At the trial on page 903 the Court, in saying that the defense could not question the witness Betty Moore as to inconsistent statements made before the Grand Jury unless it first introduced positive evidence of such inconsistent statements, blandly ignored the fact that the Court's action in denying the defense access to the minutes precluded the proof which it demanded, and then called the attempt so to question the witness a "fishing expedition for the purpose of getting the grand jury minutes in evi-

dence here and only for that purpose." By this time it seemed that the primary objective of the Court and prosecution had become the prevention of the public revelation of the testimony contained in the minutes. When counsel for a co-defendant suggested that the Court look at the minutes and then decide whether the questions could be put, the Court immediately foreclosed this by allowing such questioning at once. (P. 905). After admissions of inconsistent statements, the defense moved for the minutes (P. 908). The Court suggested getting the stenographer and refused to give the minutes to counsel. The Court then suggested that the prosecutor give the defense the name of the stenographer. (P. 909). The prosecutor evaded this, implying that he didn't know the name, but he promised to find out. Of course this was never done. The Court then instructed the prosecutor to produce the stenographer (after he should find out who the stenographer was) and also the minutes "only in relation to the matter at issue as to this witness." The prosecutor said he would try. He had but "one set" of minutes. Of course, neither any part of the minutes nor the stenographer were ever produced.

The prosecutor later, on another demand, said he would not produce the minutes, but he offered to put the stenographer on the stand to recite the testimony of the witness Moore. (P. 914).

During the direct examination by the prosecutor of the witness Betty Moore it became material to determine the date when she went before the first Grand Jury in 1965. The prosecutor refused to admit that he knew the date, and declined to place it more accurately than "either June or July." (P. 873).

Counsel for Connor moved to suppress the testimony of the witness Betty Moore while she was being cross-examined by other counsel. (Pp. 901, 902) and after she had testified on direct examination that she "went

through'' a false story of the homicide with another person which she was to give in Dorchester Court, where she testified later. (Pp. 867-868).

The Court ruled during cross-examination of the witness Betty Moore that the prosecution was not entitled to examine a transcript of the proceedings in the Dorchester Court which was in the possession of counsel for co-defendant William Doherty, saying to the prosecutor, ''Well, you wouldn't let them look at the Grand Jury minutes. I suppose they have the same rights.''

(3) (Second Paragraph)

''Under art. 12 of the Massachusetts Declaration of Rights, a defendant shall have a right to produce all proofs, that may be favorable to him. If the Commonwealth could prevent access to material witnesses by holding them in its custody, this constitutional guaranty would be seriously impaired. To say that a defendant has a right to present his defense and then to deprive him of the means of effectively exercising that right would reduce the guaranty to an idle gesture.'' . . . . . The denial of the defendants' motions was prejudicial error and this error tainted the murder convictions and the convictions for breaking and entering. If there had been a showing of special circumstances, it would have been appropriate for the court to impose reasonable conditions and restrictions on the interviews. But there was no such showing here and the denial of the motions was unconditional. *Comm.* v. *Balliro,* 349 Mass. 473; *Melanson* v. *O'Brien,* 191 F.2d 963.

On September 8, 1965, your petitioner filed a motion for the names of the witnesses who had testified before the Grand Jury, as these names had not been endorsed upon the indictment. The Court purported to grant this motion on September 14th but ordered the list ''impounded'' in the Clerk's office. This was done on October 21st. On November 23rd Connor filed a motion for the addresses of the

witnesses, and for an opportunity to interview witnesses in custody. This was denied on February 9th. On January 17th the counsel for Connor complained to the Court that he had been given no list of witnesses. The Court said, "They can't keep the witnesses from you."

Up to the time of trial counsel for the defendant Connor never was granted an opportunity to interview any witness in custody or sufficient information to enable him to interview any of the several disinterested witnesses.

This course of conduct on the part of the prosecution and the Court constituted an interference with his fundamental constitutional right to a fair trial under both state and federal law.

(4)

The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment. *Pointer* v. *Texas,* 380 U.S. 400 (1965). *Bruton* v. *United States,* 20L Ed 2d 476 (1968).

Attorneys for two co-defendants filed motions for particulars and in response on December 13th, 1965, the prosecution filed certain improper and incompetent specifications. (See pages 9ff., Papers No. 5 and No. 6, Case No. 18314, and pages 29ff., Papers No. 4 and 5, Case No. 19465, of the Summary of Record, hereinafter referred to as R.) In these particulars certain statements purporting to be factual were made as to all four defendants. They were so far from coinciding with the evidence at the trial that, in the case of William Doherty, although their purpose was to establish his guilt as an accessory before the fact, the Supreme Judicial Court was constrained to reverse the conviction of Doherty and direct the entry of judgment for him on that charge.

Aside from the fact that the prosecutor ignored and defiantly failed in these papers, or at any time prior to trial,

to furnish certain details requested, e.g., "the means by which the crime was committed," made statements of fact that he never attempted to prove, and was still concealing on December 13th the names of two material Grand Jury witnesses, Betty Moore and Ronald Hayes, referred to as "a third person" and as "other persons who were present," these particulars, which were part of the record and went to the jury with the indictment to be considered and read by them in their deliberations, contained also a most inflammatory description of the homicide, which could not fail to be prejudicial to Connor, since he was positively named as one of the killers in both sets of answers. These particulars were read to the jury by the Assistant Clerk of Court, attending the trial, as parts of the indictments, on the second day, and the reading occupies twenty-three pages of the record, as follows: as to your petitioner and the co-defendant Landry, three and a half pages, Transcript (hereinafter designated as Tr.) pp. 56-59; as to the co-defendant Janice Doherty, charged as an accessory, in whose case the particulars were most incendiary and prejudicial, eleven and a half pages, Tr. 60-72; and as to the co-defendant William Doherty, seven and a half pages, Tr. 72-79.

In view of the Court's statement to the jury, at the opening of the session on the third day, Tr. 88, 89, that the effect of the particulars when filed is "to bind and restrict the Commonwealth as to the scope of the indictment and the proof offered under it," the failure to take some action, and especially in regard to the particulars as to William Doherty, is incomprehensible except as part of the pattern revealed from the beginning by the refusal to send the case back to the Grand Jury to consider the indictment of the accused James Connor (doubtless because the Court and prosecutor were well aware that the Grand Jury could not be depended upon to be sufficiently

gullible to swallow still another version of the alleged homicide from Betty Moore, for the same Grand Jury was in session in August that had heard the matter from May or June), by the determination of the prosecutor to withhold all evidence favorable to the petitioner, by the many refusals of the prosecutor to reveal the names of the Grand Jury witnesses, in violation of the established law of the land, by the failure of the prosecutor to produce or the Court to order the production of proof of valid arrest when such was denied by your petitioner at many of the preliminary hearings on repeated statements of facts never contradicted by the prosecutor, by the persistent and successful struggle waged by the Court and prosecutor to deny the defendants the opportunity to interview certain material witnesses under appropriate conditions, the exclusion of certain testimony tending to impeach the witness Betty Moore and to demonstrate her involvement in at least two criminal conspiracies connected with the homicide although the evidence was later acknowledged by the Supreme Judicial Court to have been admissible, and by the devious maneuvers and tawdry fabrications employed and tolerated to ensure the shrouding of the Grand Jury minutes from the clear eye of inquiry according to due process.

The statements in the particulars were not presented as evidence, but they reached the jury nevertheless in a positive and uncontradicted form. Neither cross-examination nor any other form of testimony was available to contradict them. There were limiting instructions which were not particularly forceful or in any way detailed, Tr. 88-89, which doubtless had even much less than the usual effect. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . . . all practicing lawyers know to be unmitigated fiction . . . ." (Quoted

in Bruton from Mr. Justice Jackson's statement in *Krulewitch* v. *United States,* 336 US 440, 453.)

The petitioner was just as helpless in the face of these declarations as he would have been had a co-defendant's confession involving him been read, as in Bruton. And he was harmed thereby in exactly the same manner.

And the remedy; as in Bruton, was the granting of the motion for severance.

(6)

The petitioner is guaranteed the right to compulsory process for obtaining witnesses by the Sixth Amendment. *Washington* v. *Texas,* 388 US 14. (1967). Of what value is this right, or the right to have counsel, or the right to produce all proofs, that may be favorable to him (Declaration of Rights, Mass. Constitution Article XII), if such witnesses when obtained, such proofs when produced, however apposite, may not be presented by the counsel provided. Such a result manifestly does violence to those fundamental principles of liberty and justice acknowledged by all, whether the provisions of the Bill of Rights be incorporated in the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment as applied to the states, or whether those clauses are regarded in such a light that ". . . . each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects." Mr. Justice Harlan, dissenting, *Duncan* v. *Louisiana,* 20L Ed 2d 491. (1968).

The exclusion of this obviously material and technically admissible testimony by the witness Murdock, especially as part of the pattern described in (4), supra, deprived Connor of his basic and fundamental rights, especially that most basic of all principles in criminal prosecu-

tions, that by the law of the land he was entitled to a fair trial.

(7)

These paragraphs are important not because they allege irregularities, unconstitutional irregularities (as to everybody), which were prejudicial to Connor, though they may have been, but because these irregularities were part of the pattern of arbitrary disregard and denial of the defendants' rights previously described, in (4).

For the petitioner
JAMES J. TWOHIG

(Note: For pertinent statutes and constitutional provisions, see the following pages.)

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

Massachusetts Statutes:

G.L. c. 263, s.4
G.L. c. 277, s.19
G.L. c. 277, s.35
G.L. c. 277, s.35A
G.L. c. 277, s.40

Massachusetts Declaration of Rights, Constitution:

Part the First, Article XI
Part the First, Article XII
Part the First, Article XIV

United States Constitution:

Amendment 5
Amendment 6
Amendment 14, Section 1

Massachusetts Statutes

G.L. c. 263, s.4: No person shall be held to answer in any court for an alleged crime, except upon an indictment

by a grand jury or upon a complaint before a district court or in proceedings before a court-martial.

G.L. c. 277, s.19: If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent state of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

G.L. c. 277, s.35: A defendant shall not be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defence.

G.L. c. 277, s.35A: Upon motion of the district attorney or prosecuting officer, the court may order the complaint or indictment amended in relation to allegations or particulars as to which the defendant would not be prejudiced in his defence.

G.L. c. 277, s.40: The court may, upon arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime, shall so order at the request of the defendant if the charge would not be otherwise fully, plainly, substantially and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, to prepare

for his defence, the defendant desires information as to the time and place of the alleged crime or the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid.

MASSACHUSETTS CONSTITUTION

Part the First, Article XI: Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Part the First, Article XII: No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Part the First, Article XIV: Every subject has a right to be secure from all unreasonable searches, and seizures,

of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, tc make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

United States Constitution

Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MISC. CIVIL NO. 68-88-G

JAMES J. CONNOR,
PETITIONER,
v.
PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

OPINION

January 16, 1970

GARRITY, J. Petitioner for habeas corpus, Connor, and a codefendant Landry were found guilty on March 25, 1966 of murder in the first degree of Davis. The crime was committed on May 1, 1965. The jury recommended that the death penalty not be imposed and petitioner is serving a life sentence. Codefendants named Doherty were found guilty of being accessories. Petitioner's conviction was affirmed on appeal, *Commonwealth* v. *Doherty,* 353 Mass. 197, decided August 22, 1967.

The petition for habeas corpus asserts seven numbered grounds for relief, but without specifying in some instances the federal constitutional right relied upon and the exhaustion of available state remedies regarding the particular claim. Accordingly, the court entered an order limiting the hearing to reasons (1) and (3) unless the petitioner should file prehearing statements showing his exhaustion of state remedies with respect to certain grounds and the federal constitutional nature of others. No such statements were received from petitioner previous to the hearing, but at the hearing on the petition for the writ, on motion of the petitioner, leave was granted to include such statements in a brief to be submitted after the hearing. The effect of the

court's limiting order, as modified by allowance of the petitioner's motion at the hearing, has been to exclude from the court's consideration three of the seven grounds asserted in the petition, numbers (2), (4) and (5).[1] At the hearing in this court, the petitioner was represented by the same attorney who represented him at the trial and in the Supreme Judicial Court on appeal.

Findings of Fact

The evidence at the trial was to the effect that shortly before 3:00 A.M. on May 1, 1965 petitioner and Landry came to the third floor apartment in Boston in which Davis was killed in response to urgent telephone calls from the Dohertys that Davis was threatening them and their children with two revolvers. Before Connor and Landry arrived, Davis had fallen asleep on a couch in the den and had been disarmed by Mr. Doherty. When they arrived at the house, Connor and Landry rushed up the stairs and Mrs. Doherty pointed to the sleeping or dozing Davis as the one who had been threatening her family. Landry put a shotgun in Davis's belly and said, "Hey, hey" twice and, as Davis was awakening, shot him in the belly. Landry and Connor picked Davis up, one under each arm, dragged him to the doorway and let him drop down the stairs. Davis was left sprawled out on the front porch dead.

Two witnesses identified petitioner as having accompanied Landry. One of them, Betty Moore, was a boarder occupying a room in the Doherty apartment and the other was her friend, Ronald Hayes. Codefendant Mrs. Doherty testified that petitioner was not at her house on the night of the crime. Connor did not testify, but took advantage

[1] One of the excluded grounds, number (4), was nevertheless briefed by the petitioner and has been considered by the court. It claims prejudice from denial of petitioner's motion for severance because a bill of particulars filed in the case against one of the codefendants contained an allegedly inflammatory description of the killing. This ground is obviously without merit.

of the now unique Massachusetts practice, see *United States* v. *Cartano, etc.*, No. 7325, 1 Cir., Jan. 12, 1970, of making an unsworn statement to the jury in which he said he was not on the premises on the night of the crime.

The grand jury received evidence in June 1965 but took no action. It received further evidence in August and returned an indictment on August 4, 1965 charging Landry "and John Doe . . ." with the murder. On August 9 the Commonwealth filed a motion to amend the indictment by substituting petitioner's name for John Doe and the motion was allowed after a hearing at which no evidence was introduced.

During the period of approximately seven months between the indictment and the trial, defendants endeavored without success to interview Betty Moore, who was held in protective custody by the prosecution. Petitioner also sought to obtain a copy of her testimony before the grand jury in support of his motion to quash and dismiss the indictment on the ground that no evidence before the grand jury indicated that he was the "John Doe" intended to be arrested.

At the trial petitioner and other defendants unsuccessfully sought disclosure by the prosecution of Moore's grand jury testimony, after she had admitted on cross-examination that she had testified falsely before the grand jury in June 1965. She testified that she had committed perjury before the grand jury in June because of threats by a relative of the Dohertys and that she told the truth to the grand jury in August. When the defendants, including the petitioner, moved that the prosecution be required to furnish the defense with a transcript of Moore's testimony before the June grand jury, the trial judge denied the motion explaining that the method which should be pursued by the defendants was to get the stenographer who had transcribed the grand jury minutes. The judge

suggested that the prosecution attorney find out during recess the name of the stenographer and let defense counsel know so that they might bring the stenographer to the trial. So far as appears, none of the attorneys took any action in line with the court's suggestion. During further crossexamination, the defense attorneys elicited repeated admissions from witness Moore that she had committed perjury before the grand jury in June. The contents of Moore's grand jury testimony were undisclosed in the state courts and not offered in evidence in this court.

Conclusions of Law

The only substantial issue presented by the petitioner is the first part of ground (3) relating to petitioner's failure to obtain a copy of Betty Moore's testimony before the June grand jury. We shall therefore first discuss summarily grounds (1), (6) and (7) and the second part of ground (3). Ground (1) is that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment of the Constitution of the United States.[2] But it is well settled that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment. *Hurtado* v. *California*, 1884, 110 U.S. 516, *Beck* v. *Washington*, 1962, 369 U.S. 541, 545. The second part of ground (3) is that petitioner's counsel was denied the opportunity of interviewing material witnesses in the same manner as the prosecution, to which they were constantly available. Apart from its having scant sup-

[2] In support of this and all other grounds for relief, petitioner has argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds. No effort has been made in the petition or in petitioner's brief to particularize the federal rights allegedly violated in the state courts apart from general references to various provisions of the federal Bill of Rights and the Fourteenth Amendment.

port in the record and petitioner's reliance in this regard upon the Massachusetts Declaration of Rights, petitioner failed to object to the rulings of the judges of the Superior Court when the matter was brought before them in pretrial hearings and did not claim error on this score in the Supreme Judicial Court. He has probably waived this ground. In any event, he has not exhausted available state court remedies.[3] Ground (6) is that the trial court erred in excluding a certain line of questioning on crossexamination of witness Moore designed to test her credibility. Despite this court's orders before and at the hearing, petitioner's brief does not attempt to show the involvement of a federal constitutional right in this contention apart from the general statement that trial procedures must be fundamentally fair. If there was error, it does not approach constitutional dimensions. Ground (7) is likewise illusory. It alleges an error in the case against codefendants Doherty, which the petition asserts was prejudicial to petitioner because severance was not ordered. Despite this court's orders, petitioner has made no attempt to demonstrate an exhaustion of available state court remedies with respect to this ground. 28 U.S.C. § 2254. Furthermore, this ground was virtually abandoned in petitioner's brief in this court, which devotes but a single sentence to the point, including a surprising disclaimer of prejudice to the petitioner.

The issue with respect to petitioner not having received a transcript of Betty Moore's testimony before the June 1965 grand jury, denominated the first part of ground (3), was preserved at the trial and argued on appeal. It has not been disputed by the Commonwealth that the petitioner demonstrated a "particularized need",

[3] Codefendants did preserve a similar point on appeal without success. However, this does not excuse petitioner from seeking relief in the state courts because this ground involves a consideration of facts and circumstances of the case as they relate to a particular defendant.

Pittsburgh Plate Glass Co. v. *United States,* 1959, 360 U.S. 395, 400, for disclosure of Betty Moore's grand jury testimony inasmuch as she admitted perjury before the June grand jury. Regarding defense counsel's demand at the trial that the transcript be made available to them for purposes of further crossexamination, it should be noted first that the *Pittsburgh Plate Glass Co.* case did not decide whether such a procedure should be followed or whether the trial judge should examine the transcript *in camera* to ascertain the nature of the inconsistencies between the witness's testimony at trial and previously. *Dennis* v. *United States,* 1966, 384 U.S. 855, 875, holding that the determination of what may be useful to a defendant can properly and effectively be made only by an advocate, was not decided until June 20, 1966, approximately three months after the completion of petitioner's trial. However, in *Commonwealth* v. *Ladetto,* 1965, 349 Mass. 237, 244-245, the Supreme Judicial Court anticipated the holding in *Dennis* and, on petitioner's appeal, applied the *Dennis* principle in deciding the discovery question against him, two justices dissenting. The Supreme Judicial Court held that the trial judge did not deprive the petitioner of access to the minutes of the June grand jury and that counsel's failure to pursue the course indicated by the trial judge, of procuring the attendance of the grand jury stenograprer, was responsible for any prejudice to him.

In this court both parties have argued the question of the proper application of the *Dennis* rule without alluding to the necessary consideration whether it applies to criminal trials in state courts under the due process clause of the Fourteenth Amendment. It seems clear that it does not, because not "fundamental" nor "necessary to an Anglo-American regime of ordered liberty." See *Duncan* v. *Louisiana,* 1968, 391 U.S. 145, 149-50 n. 14. The Supreme Court based its decision in *Dennis* upon its super-

visory powers over federal district courts and not upon a constitutional right of the accused. *Broeckel* v. *Green,* N.D. Ohio 1967, 298 F.Supp. 249, 253. Discovery rights such as inspection of grand jury minutes are not of constitutional origin and they represent exceptions to the general rule concerning discovery in criminal cases, *Corbett* v. *Patterson,* D. Colo. 1967, 272 F.Supp. 602, 609. There has been no hint in Supreme Court cases that this procedure of disclosing grand jury minutes was thought to be compelled by the due process clause of the Fifth Amendment. *United States* v. *Lavallee,* 2 Cir. 1965, 344 F.2d 313, 315. Nor has there been any suggestion that the rule of the *Dennis* case should be applied retroactively.

Therefore any error by the courts of Massachusetts in deciding whether petitioner was entitled at trial to disclosure of witness Moore's grand jury testimony, at least as asserted by petitioner in the Supreme Judicial Court and in this court,[4] involved the interpretation of a rule of state law and not a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). With respect to the scope of federal habeas corpus jurisdiction, the identity of the state and federal discovery rules is immaterial.

Accordingly it is ordered that the petition be denied and the case dismissed.

(s) W. Arthur Garrity, Jr.
United States District Judge

---

[4] In *United States* v. *Lavallee*, *supra*, at 315, it is stated, "It could be argued with some force that when the Grand Jury testimony is exculpatory and the trial testimony inculpatory . . . failure to make the Grand Jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense. *Brady* v. *Maryland*, 373 U.S. 83 [and other cases]." We intimate no opinion on any such contention in this case. Suffice it to note that the point has never been raised by petitioner in the Massachusetts courts. See *Lamoureux* v. *Comm. of Mass.*, 1 Cir. 1969, 412 F.2d 710, 711.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

ORDER OF DISMISSAL

[January 19, 1970]

GARRITY, D.J.

This cause having come on for hearing on petition for a writ of habeas corpus and in accordance with the Court's Opinion dated January 16, 1970, it is hereby ORDERED

PETITION DENIED; CASE DISMISSED.

Dated at Boston, Massachusetts, this 19th day of January, 1970.

By the Court,
(s) KATHLEEN M. DOLAN
Deputy Clerk

(s) W. ARTHUR GARRITY, JR.
United States District Judge

DATE: January 19, 1970

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY SUPERIOR COURT

No. 19494

COMMONWEALTH *vs.*
DONALD E. LANDRY, alias EMO LANDRY,
JOHN DOE (8/9/65 true name JAMES J. CONNOR)

Offense
Murder-First Degree

Attorney	
8/9/65	9/13/65
James J. Twohig	Joseph J. Balliro
507 Broadway	44 School St.
South Boston	(for Landry)
(for Connor)	

Date of Filing

Aug. 4, 1965 Indictment returned.

Aug. 5, 1965 Copy of indictment and notice of finding of indictment sent to the Chief Justice and Attorney General.

Copy of indictment, notice of finding of indictment and that indictment would be entered forthwith on docket of this Court sent by Clerk to Sheriff for service on Landry in Common Jail.

Notice sent to Department of Mental Health as to Landry.

Aug. 9, 1965 Commonwealth's motion to amend indictment by substituting name of James J. Connor in place of John Doe, filed and allowed. Tauro, C.J. — Lotreck, stenographer.

Aug. 10, 1965 Copy of indictment and notice of finding of indictment sent to Chief Justice and Attorney General.

Copy of indictment, notice of finding of indictment and notice that indictment would be entered forthwith on docket of this Court sent by Clerk to Sheriff for service on John Doe, true name James J. Connor. Notice sent to Department of Mental Health as to Connor.

Court orders writ of habeas corpus to issue to Massachusetts Correctional Institution, Walpole, for appearance of Landry on August 13, 1965. Tauro, C.J. Writ Issued.

Entry of August 9, 1965 corrected so as to read as follows: Commonwealth files motion to amend indictment.

Court (Tauro, C.J.) having determined that true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name. Goldberg, stenographer.

Aug. 12, 1965 Order of notice with return of service on Connor endorsed thereon received from Sheriff.

Connor's petition for assignment of James J. Twohig, Esquire of Boston, as counsel, filed.

James J. Twohig files affidavit in accordance with Rule #95.

Aug. 13, 1965 Connor brought into Court from Jail — Connor's petition for assignment of James J. Twohig, as counsel allowed. Connor pleads not guilty — Court allows Connor thirty days for filing special pleas.

Connor's motion for permission to engage an investigator in sum not to exceed $500, filed and allowed.

Connor ordered committed to Jail without bail. Tauro, C.J. — Lotreck, stenographer. Landry brought into Court from Massachusetts Correctional Institution, Walpole, on writ of habeas corpus.

Order of notice to Landry of finding of indictment and entry on docket read to Landry by Deputy Sheriff, James D. Collins and attested copy of same delivered to him — Landry returned to Massachusetts Correctional Institution, Walpole.

Aug. 17, 1965 Report received from Department of Mental Health as to Landry.

Aug. 23, 1965 Writ of habeas corpus issued to Massachusetts Correctional Institution, Walpole, for appearance of Landry on August 24, 1965. Tauro, C.J.

Aug. 24, 1965 Connor's motion to inspect Grand Jury minutes filed, and denied without prejudice.

Connor's motion for admission to bail filed,

after hearing denied. Landry brought into Court on writ of habeas corpus — Court (Tauro, C.J.) grants continuance to September 7, 1965, at request of Landry. Schwartz, stenographer.

Sept. 8, 1965 Writ of habeas corpus issued to Massachusetts Correctional Institution, Walpole, for appearance of Landry on September 13, 1965.

Connor files motion for particulars — motion for names of witnesses — motion for copy of autopsy report.

Sept. 9, 1965 Hearing on Connor's motions filed September 8, 1965 to be held on September 15, 1965 at 10:00 A.M. Tauro, C.J. — Connor and parties notified.

Sept. 9, 1965 Lotreck, stenographer.

Sept. 10, 1965 Connor files motion to quash — motion to dismiss.

Sept. 13, 1965 Landry brought into Court on writ of habeas corpus — hearing on matter of assignment of counsel for Landry — Court (Hudson,J.) assigns Joseph J. Balliro, Esquire, as counsel, for Landry subject to the filing of affidavit in compliance with Rule #95 of the Superior Court, Landry assenting thereto.

Landry pleads not guilty.

Lotreck, stenographer.

Sept. 15, 1965 Connor brought into Court — hearing on Connor's motion for particulars — motion for names of witnesses — motion for copy of autopsy report — motion to quash — motion to dismiss.

Court allows motion for copy of autopsy report; all other motions taken under advisement. Paquet,J. — Mahaney, stenographer, sworn to take testimony.

Sept. 17, 1965 Affidavit of Joseph J. Balliro, Esquire, filed in accordance with Rule #95.

Sept. 24, 1965 Court denies Connor's motion to dismiss; denies motion to quash, with prejudice; allows motion for names of witnesses only as to those witnesses sworn before Grand Jury.

Court orders that said list of witnesses be otherwise impounded until further order of Court.

Connor's motion for particulars allowed as to Nos. 24 and 32; so much of No. 25 as pertains to a description of the weapon, if any; and so much of No. 31 as pertains to a place or location of alleged crime; motion is otherwise denied as to each and every other request for particulars. Paquet, J.

Sept. 28, 1965 Attorney Twohig and District Attorney notified.

Sept. 30, 1965 Connor files exceptions to rulings on motion for particulars — exceptions to ruling on motion to quash — exception to ruling on motion to dismiss. Paquet, J., notified.

Oct. 4, 1965 Landry files motion to dismiss — motion for severance — motion to strike — motion for written bill of particulars — motion for names of witnesses — motion to be permitted access to witnesses — motion

for permission to engage an investigator — motion for inspection of Grand Jury minutes — motion to inspect and copy documents — motion for copy of autopsy report.

Oct. 21, 1965 Commonwealth files list of witnesses in compliance with Court's order of September 24, 1965. List impounded per order of Court. Paquet, J.

Nov. 1, 1965 Commonwealth files answers to Connor's motion for particulars.

Nov. 4, 1965 Landry's motion to strike, after hearing, denied — motion to dismiss, after [Illegible] motion for severance; motion to strike out certain particulars of hearing, taken under advisement. Murray, J. — Lotreck, stenographer.

Nov. 10, 1965 Commonwealth files answers to Landry's motion for written bill of particulars.

Landry's oral motion that Commonwealth further specify as to item 1, after hearing, denied.

Landry's motion to dismiss denied. Murray, J. — Lotreck, stenographer.

Nov. 19, 1965 Commonwealth files motion for assignment of trial date.

Nov. 22, 1965 Court orders issuance of writ of habeas corpus to Massachusetts Correctional Institution, Walpole, for appearance of Landry on November 24, 1965. Writ issued. Kalus, J. — Lotreck, stenographer.

Nov. 23, 1965 Connor files motion to strike out certain particulars of the Commonwealth and for further particulars — motion for the present addresses of the witnesses before the

	Grand Jury and for opportunity to interview each witness.
Nov. 24, 1965	Landry and Connor brought into Court — Court (Kalus, J.) orders Commonwealth's motion for assignment of trial date be referred to Justice Murray. Lotreck, stenographer.
Jan. 12, 1966	Writ of habeas corpus issues to Massachusetts Correctional Institution, Walpole for appearance of Landry on January 17, 1966.
Jan. 17, 1966	Connor files motion for severance — motion to inspect and copy documents. Hearing on Connor's motion to inspect and copy documents — Connor waives so much of motion starting with the words "which statements" and ending with the words "in the indictment" as contained in item 4. Motion as amended by waiver, allowed. Tauro, C.J. — Lotreck, stenographer.
Feb. 3, 1966	Court (Tomasello, J.) orders issuance of writ of habeas corpus to Massachusetts Correctional Institution, Walpole, for appearance of Landry on February 9, 1966. Writ issued.
Feb. 9, 1966	Landry brought into Court on writ of habeas corpus — Connor brought into Court. After hearing, Landry's motion for severance and motion for inspection of Grand Jury minutes denied; motion to be permitted access to witnesses; motion for names of witnesses sworn to testify before Grand Jury and motion for permission to engage an investigator allowed; motion to inspect and copy documents, al-

lowed as to so much of motion as relates to inspection and copying of documents that are written in form that may relate themselves as to whether or not they might be confessions by the co-defendants in this case.

Statements made by co-defendants may be included, if reduced to writing. Landry's motion for copy of autopsy report waived in open Court. Landry's motion to suppress filed, after hearing, denied — motion to be permitted access to witnesses filed, after hearing, allowed. Conner's motion for severance; motion to strike out certain particulars of Commonwealth and for further particulars — motion for present addresses of witnesses before Grand Jury and for opportunity to interview each witness, after hearing, denied.

Motion for permission to engage a psychiatrist waived in open Court (subject to report from Department of Mental Health.) Tomasello, J. — Hanron, Stenographer.

Feb. 10, 1966 Department of Mental Health notified as to Connor.

Feb. 21, 1966 Report received from Department of Mental Health as to Connor.

Mar. 7, 1966 Court assigns Thursday, March 10, 1966, for hearing on Landry's motion to be permitted access to witnesses.

Court orders issuance of writ of habeas corpus to Massachusetts Correctional Institution, Walpole, for appearance of Landry on Thursday, March 10, 1966. Writ issued.

Commonwealth's request for issuance of certificate for out-of-state witness filed, after hearing, allowed. Tomasello, J. Certificate issued.

Mar. 10, 1966 Landry brought into Court on writ of habeas corpus — Connor brought into Court. Landry files motion to strike Commonwealth's answers to defendant William R. Doherty's written bill of particulars; motion to strike Commonwealth's answers to defendant Janice M. Doherty's written bill of particulars; motion to dismiss. After hearing, each motion denied.

Court allows Landry to renew his motion for severance, after hearing; motion denied Court allows Connor to renew his motion for severance and motion to inspect Grand Jury minutes. After hearing, each motion denied. Tomasello, J. Schwartz, stenographer.

Mar. 14, 1966 Landry brought into Court on writ of habeas corpus — Connor brought into Court. Landry's and Connor's motions to have the following questions asked of prospective Jurors — second motion to dismiss filed, after hearing, each motion denied. Tomasello, J.

Commonwealth moves for trial as to each defendant.

Certificate of protracted trial filed.

Court orders jury impanelled of fourteen members.

Trial as to each (with indictments Nos 18314, 19465, 19466 and 19495) under provisions of General Laws (Ter. Ed.) Chap-

ter 278, Sections 33A to 33G inclusive, as amended, before Tomasello, J.

Baker, Gibbons and Schwartz, official stenographers, assigned to take testimony. Court (Tomasello, J.) orders that daily copy of transcript be prepared — one for Court — one for District Attorney — one for each defendant at expense of the Commonwealth.

Mar. 16, 1966 Connor files motion to suppress evidence. Certificate of public convenience that Court be open Saturday, March 19, 1966, filed.

Mar. 22, 1966 Connor's motion to suppress, after hearing, denied. Tomasello, J.

Mar. 24, 1966 Landry's and Connor's motions for mistrial — motions for directed verdicts of not guilty filed, after hearing, each motion denied. Tomasello, J.

Mar. 25, 1966 There remaining fourteen members of the jury originally impanelled at the time of final submission of the case, by direction of the Court, the names of two Jurors were withdrawn and said Jurors were discharged from further consideration of the case. Court (Tomasello, J.) orders that said Jurors remain in custody of Officers until verdicts returned.

Mar. 26, 1966 Verdict guilty as to each defendant, with recommendation that death sentence be not imposed.

Each defendant's oral motion that Jurors be polled, denied.

Commonwealth moves for sentence as to each defendant.

Landry sentenced to Massachusetts Cor-

	rectional Institution, Walpole, for and during the term of his natural life, to be served concurrently with sentence Landry is now serving at said Massachusetts Correctional Institution.
	Connor sentenced to Massachusetts Correctional Institution, Walpole, for and during the term of his natural life. Tomasello, J. — Mittimuses issued. Schwartz, Baker and Gibbons, stenographers.
Mar. 28, 1966	Landry's claim of appeal filed.
Mar. 29, 1966	Connor's claim of appeal filed.
Apr. 7, 1966	Court orders that two copies of transcript be prepared for the Supreme Judicial Court.
	Notice of Court's order re: transcript sent to Lotreck, Goldberg, Mahaney, Hanron, Gibbons, Baker and Schwartz, stenographers.
Apr. 20, 1966	Two copies of transcripts (August 13, 1965; September 13, 1965; November 4, 1965 and January 17, 1966) delivered to Clerk by Lotreck, stenographer.
Apr. 21, 1966	Two copies of transcript (February 9, 1966) delivered to Clerk by Hanron, stenographer.
Apr. 22, 1966	Two copies of transcript (September 15, 1965) delivered to Clerk by Mahaney, stenographer.
Apr. 26, 1966	Two copies of transcripts (August 24, 1965; March 10 and March 14, 1966) delivered to Clerk by Schwartz, stenographer.
May 9, 1966	Two copies of transcript (for March 14, 1966 through March 26, 1966) delivered to Clerk by Baker, stenographer.

	Two copies of transcript (for August 9, 1965) delivered to Clerk by Lotreck, stenographer.
May 19, 1966	Request for designation of pleadings sent to Attorney Twohig for Connor and Attorney Balliro for Landry and to M. Reiser, Assistant District Attorney.
May 25, 1966	Landry's request to be allowed to and including June 29, 1966 for filing designations of pleadings and motions filed.
May 26, 1966	Landry's request to be allowed to and including June 29, 1966 for filing designations of pleadings and motions, allowed. Kalus, J.
June 29, 1966	Attorney Balliro for Landry and Attorney Twohig for Connor, orally designates pleadings.
July 7, 1966	Written notice of completion of summary of record sent to Attorney of Record for each defendant.
	Clerk's certificate of notice filed.
July 11, 1966	Connor's and Landry's motions to be permitted a free copy of transcripts of pretrial hearing, filed and allowed. Tomasello, J.
	Lotreck and Schwartz, stenographers, notified of Court's order.
July 18, 1966	Connor's motion for extension of time for filing assignment of errors filed and allowed. Pecce, J.
	M. Reiser, Assistant District Attorney, notified.
	Landry files assignment of errors.
Aug. 5, 1966	Connor files assignment of errors.

Oct. 3, 1966	Record on appeal entered in Supreme Judicial Court. (Attorneys of Record notified)
Aug. 22, 1967	Rescript Received from Supreme Judicial Court: — "Judgment Affirmed as to Landry and Connor". [Paper #17 in #18314]. All parties notified.
Dec. 13, 1967	Motion of the defendant, James J. Connor for a Transcript of the Trial without cost, filed. Submitted to Court, Rose, J. — after hearing allowed. Rose, J. — Brown, stenographer. [Stenographers Schwartz, Baker and Gibbons notified] [Stenographers Lotreck, Goldberg, Mahaney and Hanron notified on February 7, 1968]
Dec. 15, 1970	Connor's motion that he be admitted to bail, filed

SUFFOLK COUNTY SUPERIOR COURT

No. 19494

COMMONWEALTH

vs.

DONALD E. LANDRY, alias, et al.

MURDER — FIRST DEGREE

August Sitting, 1965

Attorney for Defendant

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. At the SUPERIOR COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August in the year of our Lord one thousand nine hundred and sixty-five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

DONALD E. LANDRY, otherwise known as EMO LANDRY, and JOHN DOE, the true name and a more particular description of the said John Doe being to the said Juros unknown,

on the first day of May, in the year of our Lord one thousand nine hundred and sixty-five, did assault and beat one Robert W. Davis with intent to murder him, and by such assault and beating did kill and murder the said Robert W. Davis.

A TRUE BILL

MURRAY P. REISER
Assistant District Attorney

CLIFTON A. GASKILL
Foreman of the Grand Jury.

A true copy
Attest:
(s) JOHN P. SWIFT, *Asst. Clerk*

August 4, 1965
Returned into said Superior Court by the Grand Jurors and ordered to be filed.
Attest:

EDWARD V. KEATING, *Clerk.*

A true copy
Attest:

....., *Clerk.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss. Superior Court

19494

[TITLE OMITTED IN PRINTING]

MOTION TO AMEND INDICTMENT.

NOW Comes the Commonwealth in above entitles action and moves this honorable court that the name John Doe be stricken from the above indictment wherever it appears and the name James J. Connor be substituted wherever the name John Doe appears.

FOR THE COMMONWEALTH
(s) MURRAY P. REISER
MURRAY P. REISER
Asst. Dist. Atty.

Filed Aug 9.1965
Allowed & exception saved.
TAURO, C.J.

SUFFOLK COUNTY Superior Court
No. 19494
WARRANT ON INDICTMENT
August 4, 1965.
COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Police Officers of the City of Boston in said County, the Officers of the Court hereinafter named and all other officers authorized to serve criminal process in said Commonwealth

GREETING:

WHEREAS, the Grand Inquest for the Commonwealth of Massachusetts, at the Superior Court for the transaction of Criminal Business, which was begun and holden at Boston within and for the County of Suffolk on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-five did upon their oaths present, that

JOHN DOE, the true name and a more particular description of the said John Doe being to the said Jurors unknown,

on the first day of May A.D. 1965 at said Boston, did commit the crime of

Murder in the First Degree

These are therefore in the name of the Commonwealth of Massachusetts to will and require you to apprehend the body of the said Doe if he may be found in your precinct and him forthwith carry before the said Superior Court or commit to the Common Jail in said County that he may be secured to answer to said presentment.

WITNESS, G. JOSEPH TAURO, ESQUIRE,
Chief Justice of said Court.

Dated at Boston aforesaid, this fourth day of August in the year of our Lord one thousand nine hundred

and sixty-five and sealed with the seal of said Court.

(s) MARY C. PHELAN
Assistant Clerk.

SUPERIOR COURT
FOR THE TRANSACTION OF CRIMINAL BUSINESS
Clerk's Office

Room No. 712, Court House
Pemberton Square

Boston, August 10, 1965

TO THE DEPARTMENT OF MENTAL HEALTH
IN THE COMMONWEALTH OF MASSACHUSETTS:

In accordance with the provisions of G.L. (Ter. Ed.) Chap. 123, Sec. 100A, I hereby notify you that the Grand Jurors in attendance upon said Court at the present August Sitting, returned an indictment against

James J. Connor

for the crime of murder in the first degree

and he is in custody in the Common Jail in said Boston.

JOHN P. SWIFT, *Assistant Clerk.*

No. 19494
A true copy
Attest:

(s) JOHN P. SWIFT, *Assistant Clerk.*

SUFFOLK, ss. BOSTON, August 6, 1965

In obedience to the within warrant, I have arrested the within-named defendant James J. Connor — and the Superior Court within named not being in session, I have committed him to the Common Jail within named.
Charles St.
and now have before the Court.

(s) JOHN E. BARRY
Police Officer of Boston
C.I.D. Headquarters

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY SUPERIOR COURT
[TITLE OMITTED IN PRINTING]
No. 19494

MURDER.
FIRST – SECOND – DEGREE.

August 10, Sitting, 1965

ORDER OF NOTICE TO PRISONER OF FINDING OF INDICTMENT AND ENTRY ON DOCKET

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court for the Transaction of Criminal Business.

August Sitting, A.D. 1965

To the Sheriff of our County of Suffolk
or any of his Deputies, GREETING:

WE COMMAND YOU that you notify John Doe, whose true name has been discovered to be James J. Connor, and has been entered upon the record by order of the Court on August 9, 1965, who is in the common jail in said County, that an indictment was found and returned into said Superior Court at the present August sitting, wherein said James J. Connor is charged with the crime of Murder, in the —FIRST—SECOND— degree, a true copy of said indictment is hereto annexed, and that said indictment will be entered forthwith upon the docket of the said Superior Court holden within and for said County of Suffolk.

And you, said Sheriff, or any of your Deputies, are further required to deliver to said Connor an attested copy of said indictment with an attested copy of this order.

Hereof fail not, and make return of this order with your doings thereon into said Superior Court.

Witness, G. JOSEPH TAURO, Esquire, Chief Justice of said Superior Court, and the seal of said Court, at said Boston, this tenth day of August in the year of our Lord one thousand nine hundred and sixty-five.

[SEAL] (s) JOHN P. SWIFT, *Asst. Clerk.*

SUFFOLK, ss. BOSTON, *August* 11, 1965

I have this day notified the within-named defendant, as directed herein, and delivered to him in hand an attested copy of the indictment with an attested copy of this order.

(s) FREDERICK SULLIVAN
Sheriff of Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court

[TITLE OMITTED IN PRINTING]

STENOGRAPHIC TRANSCRIPT OF HEARING ON MOTION TO SUBSTITUTE THE NAME OF JAMES J. CONNOR IN A JOHN DOE INDICTMENT

Before: TAURO, C. J.
Boston, Massachusetts
Monday, August 9, 1965.

APPEARANCES:

Murray Reiser, Assistant District Attorney, for the Commonwealth.

James J. Twohig, Esq., for the defendant Connor.

[1] *Monday, August 9, 1965*

Mr. Reiser: If Your Honor please, I have two motions just prepared by the Commonwealth. One is a motion to amend an indictment in the case of Commonwealth of Massachusetts vs. John Doe. At the time the indictment was returned, the District Attorney and the grand jury did not know the name of the defendant. Since the indictment has been returned, we have ascertained the name of the defendant.

The Court: Have you given a copy to counsel?

(Mr. Reiser gave Mr. Twohig a paper.)

The Court: Do you object to the allowance of the motion?

Mr. Twohig: Yes, I object to it.

The Court: For what reason?

Mr. Twohig: There's no information on which the name of John J. Connor be substituted. Apparently Connor was arrested because of the circumstances in which he was found, and because a vague description had been given to

the grand jury and on which John Doe had been indicted, and I see no additional evidence which justifies his being named here as defendant.

The Court: Well, the facts are that you have [2] a perfect defense to the offense, then. But not to this. This is a very common procedure.

Mr. Twohig: If Your Honor will save my exception.

The Court: Yes. Allowed. Exception is noted.

EXCEPTION No. 1.

Mr. Reiser: If Your Honor please, I now have a motion to inspect the premises where the crime was committed.

The Court: You don't represent the owner of the premises?

Mr. Twohig: No, Your Honor.

The Court: Allowed.

Mr. Twohig: Your Honor, on that motion, may counsel for the defendant accompany the District Attorney, Assistant District Attorney, in the inspection of those premises?

The Court: I think he is entitled to make an inspection.

Mr. Reiser: Yes, Your Honor. We're also going to send in a police officer to make a sketch about the area, for purposes of trial.

The Court: You make a motion.

[3] Mr. Reiser: Counsel can come in there at any time. We're going to send our own police officer in to sketch the area for the purposes of trial.

Mr. Twohig: I will bring my own motion, Your Honor.

The Court: You say in open court that you will notify counsel when you are going there, so that he may accompany you.

Mr. Reiser: Yes. We will go ourselves, first. I will go in myself. Later on, I am going to send in a police officer, who is a draftsman, who will then sketch out the area. I won't be there. The first time when I go, I will notify

counsel. The second time, we'll be sending in a police officer, drawing.

The Court: You're going there first?

Mr. Reiser: Yes.

The Court: When you go there, you notify counsel, so he can come with you.

Mr. Reiser: Yes.

The Court: Is that satisfactory?

Mr. Twohig: Yes.

The Court: Anything else?

Mr. Reiser: Nothing else, Your Honor.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss Superior Court

[TITLE OMITTED IN PRINTING]

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS ON ARRAIGNMENT OF DEFENDANT

Before: TAURO, C. J.
Boston, Massachusetts
August 13, 1965.

APPEARANCES:

Murray Reiser, Assistant District Attorney, for the Commonwealth.

James J. Twohig, Esq., for the Defendant Connor.

[A-1] *Friday, August 13, 1965*

Mr. Twohig: May it please the Court, I understand that the next matter in order for consideration is Commonwealth against James Connor. I have a paper for Your Honor's consideration, preliminary to his arraignment. You've got a copy of that.

Mr. Reiser: What is that on — appointment of counsel?

Mr. Twohig: Yes. There's also an affidavit of my own, Your Honor.

The Court: Allowed.

Mr. Reiser: Your Honor please, may the defendant James J. Connor be arraigned?

The Court: Yes.

The Clerk: James J. Connor, this indictment returned against you on August 4, states that..... (The Clerk read Indictment No. 19494.)

On August 9, 1965, the Commonwealth filed a motion to amend indictment. The Court (Tauro, Chief Justice), on the above motion, having determined that the true name of the defendant has been discovered to be James J. Connor, ordered the name James J. Connor to be entered on the record as the true name of the defendant.

[A-2] What say you, James J. Connor to this indictment charging you with first-degree murder?

James J. Connor: Not guilty.

The Clerk: Are you guilty or not guilty?

James J. Connor: Not guilty.

Mr. Twohig: Your Honor, I have now motions for the consideration of the Court for the appointment of an investigator and the appointment of a psychiatrist.

The Court: Do you want to step forward?

Mr. Reiser: I don't think in this case, in view of the particular case, the Commonwealth recommends there be no bail.

Mr. Twohig: Your Honor, if I may say this: I don't know what the facts are to which the District Attorney has alluded. No facts have been revealed in this case. Certainly the facts with relation to whatever identification, means of identification or description that the grand jury had before it of the man alleged to have committed the crime or to have been involved in the commission of the crime, are not. First the description in the paper which we have from the grand jurors is a complete blank. There is no such description. And apparently there is no description in the

hands of officers who arrested this man subsequent to his indictment on [A-3] August 4, I believe. Now, the witnesses before the grand jury, according to my information, were the same witnesses and appeared there no less than three times between May 1 and the date when Connor — or, rather, when Landry was indicted. Connor cannot be regarded as having been indicted in this case until August 9 Monday of this week, when the indictment was amended to include his name.

When the officers went to the home of Landry to investigate, they did not know the name of James J. Connor. They had no description of James J. Connor that appears on any record, and I believe they had no description at all. On the date when they arrested him, just a few days after the indictment on August 4, he was arrested in the apartment of Landry, where he was in company with three or four other friends, including, I believe, the wife of Landry.

Now, Your Honor, at that time, he was in company with another man of his size and description, and these police officers asked them who they were, asked them to identify themselves, which they did. The police officers did not know them by name, any more than they knew them by their appearance or by any description. Eventually, after long conversation, the police officers decided to arrest them because they were the only two men present, [A-4] and they took them to Police Headquarters. Now, both these men were detained at Police Headquarters for quite a number of hours — six or seven hours, I believe — and both of them were under arrest, Your Honor, as the same John Doe. Nevertheless, they were required to release one of them, the man who was with Connor, because of the fact that that man was known to have been in another place, a place of incarceration in this Commonwealth, on the date of the crime, so it couldn't have been him, obviously.

Connor was held, not on description, Your Honor, but on suspicion, and since the name of John Doe, on suspicion.

Now, Your Honor, this crime is alleged to have occurred on May 1 of this year. The man in whose apartment that this occurred was brought to Dorchester Court almost immediately afterward. He pleaded not guilty. He was put in Charles Street Jail, where he still is. In the meantime, the charge against him has been reduced to that of accessory. He has been before the grand jury, and other witnesses have been before the grand jury, but they are the same witnesses, and the three times that they were before the grand jury on this case, they were never able to furnish any description or any name of James J. Connor — [A-5] no nickname, no real name, no identification of any kind. He was not named until after he was arrested, until after the Commonwealth had a suspect.

The circumstances under which he was arrested are very peculiar. When the police officers entered the apartment, they entered through the front door. They were admitted. There was no attempt to keep them out. There was a back door to the apartment. Connor did not flee. Connor remained there. Connor had not made any attempt to lead anything other than the normal life that he always led since May 1. He has not left the Commonwealth, he has not hidden, he has not been aware, apparently, of any connection between any friend of his and this crime; and it came as a complete surprise to him when he was arrested; so I think the circumstances in this case, Your Honor, are of a nature quite other than that which might justify his being held without any bail whatsoever. This defendant has no fear of conviction in this case, and no reason to run away, and consequently, Your Honor, I think he recommends himself to your consideration for bail.

The Court: Are you aware of his record?

Mr. Twohig: Yes, Your Honor, I'm aware of his record. I'd like to point out to Your Honor that he has [A-6] never been convicted of a crime of violence, to my knowledge.

The Court: Well, the only thing before me is an affidavit that this man is John Doe. I cannot go into his guilt or lack of guilt.

Mr. Reiser: Without violating the secrecy of the grand jury, I think my brother is misrepresenting the facts. I wasn't there when he was arrested, but I understand he attempted to flee. Based on these facts, the Commonwealth highly recommends there be no bail.

Mr. Twohig: The District Attorney's office almost invariably recommends no bail in cases of this kind, but Your Honor, I feel they should at least give you some information on which they justify. We still have nothing to Connor's discredit in this case.

The Court: I think the obvious fact is that the grand jury has indicted him for first-degree murder.

Mr. Twohig: They never indicted Connor, Your Honor.

The Court: That remains to be seen. That is a matter for trial, not on a motion for bail or reduction of bail.

Mr. Twohig: Your Honor, I don't like to seem persistent, but the record reveals that the grand jury knew [A-7] that there were at least two men involved, and that's all they knew. They must have had something.

The Court: Excuse me. Do you have the grand jury minutes?

Mr. Reiser: They're being typed up, Your Honor. They haven't been typed.

The Court: Well, as an officer of the court, do you state to me that counsel is in error?

Mr. Reiser. In certain things, not in all.

The Court: When will the minutes be ready?

Mr. Reiser: They're being typed up. Considerable time was spent in the grand jury in this case.

Your Honor, I'd like to approach the bench and supply the Court with information.

The Court: I don't think you should. I don't think it's proper.

Mr. Twohig: Your Honor, I understand that Your Honor would like to look at the minutes of the grand jury, and I will in the meantime prepare the motion for bail.

The Court: Well, for the time being, at least this Court will excercise its discretion and hold him without bail. If you want to renew your motion at a later date for bail, you may do so. In the meantime, if that motion is presented, I will look at the grand-jury minutes.

[A-8] Mr. Twohig: Thank you. Now, I have two other preliminary motions, one for the appointment of an investigator — I think this case will require some investigation, Your Honor; and perhaps Your Honor would consider this motion at this time, or hold it for further consideration.

The Court: This motion is allowed. I will not act upon the motion for an appointment of a psychiatrist until after there has been a finding.

Mr. Twohig: Very well, Your Honor.

The Court: And at that time you may renew this motion.

Mr. Twohig: Very well, Your Honor. Your Honor, I have a number of further motions I'd like to file — one for particulars, one for inspection of the grand-jury minutes; and may I have 30 days to file those motions?

The Court: You have 10 days, in any event.

Mr. Twohig: Yes. I would like to have 30 days.

Mr. Reiser: If Your Honor please, I suggest 15 days, for the reason that we'd like to advance this case for speedy trial.

The Court: When do you want to move trial?

Mr. Reiser: October 1.

The Court: That gives him plenty of time. Thirty days.

[A-9] Mr. Twohig: Your Honor, in view of the unusual aspects of this case, I doubt very much that a full investigation will be concluded by that time. Substantial work has to be done on it.

The Court: That remains to be seen. In the meantime, you may have 30 days for special pleas and motions.

Mr. Twohig: Thirty days. Thank you.

The Clerk: James J. Connor, you are ordered held without bail at the present time.

Mr. Reiser: That's all, Your Honor.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Paper No.15 No. 19494

[Title Omitted in Printing]

CONNOR'S MOTION TO QUASH

[Filed September 10, 1965]

Now comes the defendant and moves that this Honorable Court quash the indictment against him and assigns as his reasons the following:

1) That there is nothing in the said indictment to indicate that John Doe was ever described to the Grand Jury by any description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means.

2) That there is nothing in the warrant based upon said indictment to indicate by description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means, that the John Doe named in said indictment was intended by the Grand Jury to be indicted or to be arrested for the crime charged.

3) That, at the time of the arrest of the defendant, James J. Connor, the officers making the arrest did not have a warrant against him nor did they have a warrant against John Doe based on said indictment in their possession, nor did they have any reliable information upon which to base an arrest of the defendant, James J. Connor; and, that, therefore, said arrest was illegal and in violation of the Constitutions of Massachusetts and of the United States.

4) That the amendment of the indictment by motion of the office of the District Attorney subsequent to the arrest of James J. Connor was not an action of any Grand Jury nor based upon such action.

5) That no evidence has been presented to any Grand Jury since the arrest of James J. Connor for the purpose of obtaining a lawful indictment of said defendant.

6) That the defendant has never been indicted by a Grand Jury of this Commonwealth.

7) That on all of these facts James J. Connor has never been lawfully indicted for the crime charged in these proceedings in this Commonwealth.

For the defendant,
/s/ JAMES J. TWOHIG

Sept. 10, 1965—Filed
September 24, 1965—After hearing, the within motion is denied with prejudice.
/s/ WILFRED J. PAQUET
Justice Superior Court.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Paper No. 16 No. 19494

[Title Omitted in Printing]

CONNOR'S MOTION TO DISMISS

Now comes the defendant and moves that this Honorable Court dismiss the indictment against him and assigns as his reasons the following:

1) That there is nothing in the said indictment to indicate that John Doe was ever described to the Grand Jury by any description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means.

2) That there is nothing in the warrant based upon said indictment to indicate by description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means, that the John Doe named in said indictment was intended by the Grand Jury to be indicted or to be arrested for the crime charged.

3) That, at the time of the arrest of the defendant, James J. Connor, the officers making the arrest did not have a warrant against him nor did they have the warrant against John Doe based on said indictment in their possession, nor did they have any reliable information upon which to base an arrest of the defendant, James J. Connor; and that, therefore, said arrest was illegal and in violation of the Constitutions of Massachusetts and of the United States.

4) That the amendment of the indictment by motion of the office of the District Attorney subsequent to the arrest of James J. Connor was not an action of any Grand Jury nor based upon such action.

5) That no evidence has been presented to any Grand

Jury since the arrest of James J. Connor for the purpose of obtaining a lawful indictment of said defendant.

6) That the defendant has never been indicted by a Grand Jury of this Commonwealth.

7) That on all of these facts James J. Connor has never been lawfully indicted for the crime charged in these proceedings in this Commonwealth.

For the defendant,
/s/ JAMES J. TWOHIG

Sept. 10, 1965—Filed
September 24, 1965—After hearing, the within motion is denied with prejudice.
/s/ WILFRED J. PAQUET
Justice Superior Court.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

[TITLE OMITTED IN PRINTING]

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

[1] BEFORE: Paquet, J.

APPEARANCES:

Assistant District Attorney Murray Reiser,
for the Commonwealth.
James Twohig, Esquire,
for the Defendant.

September 15, 1965

[2] The Court: Yes, Gentlemen, let it appear, Mr. Stenographer, that the defendant James J. Connor—I take it this is Mr. James J. Connor?

Mr. Twohig: Yes, your Honor.

The Court: Is present in Court, represented by his counsel James J. Twohig, Esquire.

Now, there are five motions here.

Mr. Twohig: Yes, your Honor.

The Court: I notice number 14, motion for a copy of the autopsy report—

Mr. Reiser: I have agreed beforehand, your Honor, to give it to my Brother.

The Court: Are there any other reports of post-mortem examinations?

Mr. Reiser: The only thing I have is the autopsy report. I have it right here. Anything that I do acquire along that line I shall give it to my Brother.

The Court: What do you want me to do with this motion?

Mr. Reiser: You can allow it.

The Court: All right. Allow the motion for a copy of the autopsy report.

Now, there is a motion for particulars. Defendant's motion for names of witnesses. Motion to [3] quash; motion to dismiss. All right, I'll hear you, Mr. Twohig.

Mr. Twohig: First, your Honor, I'd like to take up the motion to dismiss and the motion to quash at one and the same time as they are identical and have been filed for procedural reasons which may or may not be well founded.

The Court: You say they are identical except they are named different?

Mr. Twohig: That's right, your Honor.

The Court: All right. I'll hear you.

Mr. Twohig: This case, your Honor, there was an indictment on August 2, I believe, the first Monday in August of this year which was returned by a Grand Jury after a hearing which was, I believe, the fourth hearing held by a Grand Jury on the matter of the alleged murder of Robert Davis. In this indictment two defendants were named. One of them was named as a particular person and the other one was named as a party unknown; John Doe. These are the words in the indictment: "John Doe the true name and a more particular description of the said John Doe being to the said Jurors unknown." Now, it's well established in this Commonwealth under Articles 12 and 14 of the Declaration of Rights that an indictment, or a complaint, must be [4] certain and precise in substance and in form. That has been stated in Jones against Robbins where Chief Justice Shaw said, "The right of individual citizens to be secure from an open and public accusation of crime and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a Grand Jury, in case of high offenses is justly regarded

as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

And Justice Pierce in Commonwealth against Harris—I didn't give you the citation on Jones against Robbins, I don't think, your Honor, it was 8 Gray, 329.

Commonwealth against Harris is 121 Northeastern 409 that is the citation I have on it. Said about the words of Chief Justice Shaw, "The above quotation is a declaration and decision that the twelfth article of the Bill of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offenses when, in truth, there was no sufficient cause to suspect their guilt."

Now, in Commonwealth against Phillips, your Honor, 16 Pickering, 211, it was said, "No subject [5] shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally described to him. The reasonable degree of certainty required in an indictment is so familiar, that it requires no authorities to support or illustrate it."

In the same case Chief Justice Shaw said, "But where, as in the present case, the complaint is the only basis of the proceedings, the only statement of the offense, where it is made to a court of record, not with a view to an arrest, examination and commitment, but with a view to a judicial investigation, trial, and conviction, as a case within its admitted jurisdiction, when in form and substance the conviction follows and affirms the matter of the complaint, and regulates the judgment to be entered, we think it is required, as well by the rules of the common law, as by the express requisition of the Declaration of Rights, that such complaint shall be, in a reasonable degree, certain, both in substance and in form and that the complaint under consideration, not having these re-

quisites, is not sufficient to sustain the judgment rendered upon it; and the exception is allowed."

Now, your Honor, these general principles have come down to us from ancient times and were explicitly stated in the Articles of the Declaration of [6] Rights.

In this Court more than 100 years ago, in the Supreme Judicial Court of Massachusetts a case came up which is almost foursquare with this case, Commonwealth vs. Crotty, in which a John Doe indictment—

The Court: What?

Mr. Twohig: Crotty.

The Court: What is the citation?

Mr. Twohig: 10 Allen, 403.

The Court: All right. Thank you.

Mr. Twohig: On page 404.

In discussing this case, your Honor, I'd like to call your attention to the fact that the words which are in the indictment in this case are the same words that were on the warrant which was issued on the indictment and which was outstanding when Mr. Connor was arrested, by accident. And, in the apartment of a person that the police had come to search, not looking for Mr. Connor. And, where they did not expect to find him. And, after a failure to search for Mr. Connor from May 1 up to August 6th; or to go to his home or to look for him in any way.

I think your Honor has probably read my motion for particulars and seen my allegations of those facts.

[7] Now, in this case of Commonwealth vs. Crotty, a warrant was issued for the arrest of a man named Crotty. And when the warrant was being served, Crotty said that it didn't apply to him. And his friends agreed with him. And they resisted the service of the warrant and the arrest of Mr. Crotty, and they were all brought to trial and convicted of riot, including Crotty. And the

Court said in regard to the warrant that it was an unlawful warrant. And here is what the Court said in discussing it. "We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant, upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the Constitutional right of the citizen, as set forth in the Declaration of Rights, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants, therefore, are [8] contrary to this right, if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest or seizure. This is in fact only a declaration of an ancient common law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void.

It must be sufficient," said the Justice in commenting on the warrant, "to indicate clearly on whom it is to be served by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he at-

tempted to serve it. He acted without warrant and was a trespasser."

Now, your Honor, in the case of Connor, the warrant that was outstanding against him was on its face void. If that warrant were lawful, your Honor, process could be issued of the same kind on any charge [9] against any person in this Courtroom and he could be arrested without cause or without reason except the vague suspicions of some person who might swear out a complaint or who might bring out an indictment against him in some manner. Even if no indictment were brought out against him, if a John Doe indictment were brought out against some person without a description, anybody having the authority to do so, and being of a mind to act on mere suspicion or with vague ideas, might go out and arrest anybody against whom he had any particular bias. Your Honor, that kind of legal process was long, long ago denounced and repudiated by American Law.

In this particular case Connor has never been indicted. There is no description of any kind in the indictment; none on the warrant. When he was arrested he was questioned for some time, and he was arrested, they put handcuffs on him finally in the apartment where he was found where the police went looking for somebody else. He was not the only one who was arrested, your Honor. There was another man of the same size arrested with him; same height; same weight; same general appearance.

Now, the officers in arresting these two men, after a long conversation in which they showed some uncertainty, might have been acting on suspicion [10] or they might have been acting on information. But if they have acted on information it is their obligation to show if they acted with probable cause and they have to show that to a Grand Jury, your Honor. It is not possible where a man has not been indicted by a Grand Jury for an officer to arrest a man

on a void warrant and on information without probable cause. That is if he has no reason to believe that his informant is reliable or other facts and circumstances on which he can reasonably justify such a belief. And he certainly cannot come into Court after making an arrest, whether he is a member of the Boston Police Department or any other organization, and obtain an indictment by motion. And that is what was done in this case, your Honor.

Now, your Honor, I submit that the process that was applied to Connor in this case is unconstitutional, unjust, unlawful and dangerous. That it should be repudiated by this Court. And that Connor should be set free until and unless the Commonwealth has probable cause to arrest him and sufficient evidence at least to present to a Grand Jury for the return of an indictment. And I, therefore, leave that motion and the accompanying motion to dismiss in your hands.

My second motion is the motion for particulars, your Honor, and I think the main question will arise on [11] that motion on the matter of the secrecy with which Grand Jury proceedings are ordinarily clothed. Originally, your Honor, and it seems to me that this appears from the statutes themselves, that the mantle of secrecy was thrown around the Grand Jury for the purpose of protecting the Grand Jurors themselves and the prosecuting officers who went before the Grand Jury, and rightly so.

I don't think that the matter of protecting the witnesses was considered as such a serious or important matter. I think the fact that today a list of the witnesses is required to be given to the Clerk and recorded by him, after a Grand Jury presentment, is evidence of that, your Honor. But there is no doubt that the Grand Jury should be protected in its counsel.

If I can find my quotation here I'll give you the case,

your Honor. It is the Commonwealth against Hill, 11 Cushing, 137 and Commonwealth against Mead, 12 Gray, 167.

In the Commonwealth against Mead, your Honor, it was said by Justice Bigelow that there were three reasons for the sanction of secrecy.

One was to secure and utmost secrecy of disclosure of alleged crimes and offenses by prosecutors may be secured. [12] Two, that perjury and subornation of perjury may be prevented. That is during the Grand Jury hearing, your Honor. And there have been cases, your Honor, I submit to you, that there have been many cases where the defendants have attempted to communicate with the Grand Jury and to present their side of the case while the Grand Jury was in session. And they have presented fairly strong arguments for so doing, but nevertheless their theories have been rejected by our Supreme Court on the grounds that the jurors themselves and the prosecutors should be protected while they are in session, your Honor.

Thirdly, to conceal the fact that an indictment has been made until presentment and arrest.

Then the justice said, "But when these purposes are accomplished, the necessity and expediency of rataining the seal of secrecy are at an end. No harm can arise to the cause of the public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the Grand Jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defense, by enforcing a rule of exclusion, having its origin and [13] foundation in public policy, after the reasons on which this rule is based have ceased to exist. We think the exclusion of such evidence" — by a Grand Juror — "is not sanctioned by any rule of law or sound principle of public policy."

In that case, your Honor, Commonwealth against Mead, a Grand Juror was called to testify in order to impeach a witness who had testified before the Grand Jury and then testified before the Traverse Jury. And the Court, of course, upheld the right of the defendant to call the Grand Juror to testify. In that case you see, your Honor, the veil of secrecy was lifted, but at the same time there was no atempt to question the Grand Juror on the deliberation of the Jury which are always held sacred, or on the advice of the prosecutors which are likewise held above inquiry. And those are the things which were originally sought to be protected by the statute.

In Commonwealth against Hill the Judge said, "The extent of the limitation upon the testimony of Grand Jurors is best defined by the terms of their oath of office, by which 'the Commonwealth's counsel, their fellows, and their own, they are to keep secret.'"

There are many, many cases on this, your Honor, and there are two new ones in which the Federal [14] principle, which has been laid down in so many cases that where there is a particular need, where there is a compelling necessity to avoid injustice, that the secrecy of the Grand Jury will not be observed after an indictment and that matters of testimony before the Grand Jury by witnesses may be revealed. How else could it be found, your Honor, that, for example, more than one witness was in the room at the same time which is in itself a violation of the secrecy of the Grand Jury proceedings? Or other situations he disclosed which have been revealed in the cases of the Supreme Court and of the United States Court and the various Federal Court? I have enumerable cases on this principle, your Honor, and it seems to me that there is no doubt where there is a necessity to avoid an injustice, a deep necessity, a particular need to show certain facts in order to guarantee a defendant his constitutional rights,

that the veil of secrecy must be lifted and that the Court has discretion to lift it.

In appeal to your Honor to exercise his discretion in order to grant Connor his constitutional, his statutory and his common law rights in this matter.

I will pass on now to the next motion —

The Court: Well, let me interrupt you.

Mr. Twohig: Yes, your Honor.

[15] The Court: You take the position that, notwithstanding what you called to my attention, that this motion for particulars should be allowed?

Mr. Twohig: Yes, your Honor.

The Court: And in this form?

Mr. Twohig: Yes, your Honor.

The Court: These are only interrogatories, aren't they?

Mr. Twohig: No, your Honor, they are inquiries into certain facts relating to the deliberation of the Grand Jury. They do not relate to the Commonwealth's counsel. They do not relate to the counsel of the jurors. They do not relate to any votes cast by the jurors. They relate only to certain facts. One of them is the number of session of the Grand Jury.

The Court: What difference does that make?

Mr. Twohig: It will show, your Honor, that in spite of the number of sessions of the Grand Jury at which witnesses were entertained and heard that Connor's name was never brought out by the Grand Jury on an indictment, nor any description of Connor. And that, your Honor, I think establishes an irrefutable conclusion that they had no knowledge of Connor's connection in this case in any way either as a known or an unknown person.

[16] All the Grand Jury knew from these various sessions about this alleged crime was the name of the co-defendant and whatever else they may have known about

him, and I am not inquiring about that, and the fact that there was a second man present at the time of the alleged crime. Now, that is all they knew. And that is not sufficient knowledge on which to indict anybody, your Honor. Where no particular person is suspected, no warrant can be issued and no indictment can be made except a John Doe indictment on which a warrant cannot be served until there is information leading to probable cause.

The Court: Where, where does that information —

Mr. Twohig: In the arrest.

The Court: What?

Mr. Twohig: In the arrest and then he has to be brought into the Grand Jury.

The Court: In the possession of the person who makes the arrest, not in the warrant.

Mr. Twohig: If he's acting not on the warrant then it has to be in his possession and there has been no showing of anything establishing probable cause, and the burden, according to the Federal cases is on the prosecution to establish that knowledge.

[17] The Court: All right.

Mr. Twohig: And that is alleged in my motion.

However, in this particular case, Connor has never been indicted, but that was in relation to my first motion that I argued that point.

Now, going on to the motion for names of witnesses. It seems clear from the statutory and case law that we are entitled to the names of the witnesses before the Grand Jury. Chapter 277, Section 9, establishes the obligation on the Grand Jury to file a list of the witnesses with the Clerk of Court, and I suppose there is a reason for that. And I submit that the reason is the reason which is enforced in the cases, Commonwealth against Knapp, 9 Pickering, 495; Commonwealth against Locke, 14 Pickering, 485; Commonwealth against Walton, 17 Pickering,

403; Commonwealth against Edwards, 4 Gray. All those cases are old cases and they solidly establish the fact that the defendant was entitled to a list of the witnesses before the Grand Jury, and none of these decisions has ever been overruled.

With your Honor's indulgence I'll read a few paragraphs from the case. In Commonwealth against Knapp it was said, "Counsel for the defendant stated it to be the English practice, to endorse on the indictment [18] the names of the witnesses examined.

If an indictment is found upon improper evidence, it ought to be known." And that is another statement bearing on the secrecy of proceedings.

"A list of witnesses has never been refused in a case of this kind.

We are of opinion that the list shall be furnished to the counsel for the prisoner."

The Court: That was a capital case?

Mr. Twohig: Yes. And this is a capital case which we are dealing with today, your Honor.

Commonwealth against Locke, "On the general principles of justice and sound policy, the prisoner was entitled to know what persons had been examined as witnesses before the Grand Jury."

Commonwealth v. Walton, the Court said, "The prisoner was entitled to a list of the witnesses examined before the Grand Jury, but the practice had not gone beyond that." That was in a case, your Honor, where they wanted a list of all the witnesses.

Now, in the Federal cases today the prosecution is required to give a list of all the witnesses at least 10 days before the trial in order that the defendants may prepare itself adequately to meet the charge and the evidence.

[19] In this Court, in our Court in Massachusetts we have not so far as I know gone that far. But I do expect

In that case, your Honor, Commonwealth against Mead, a Grand Juror was called to testify in order to impeach a witness who had testified before the Grand Jury and then testified before the Traverse Jury. And the Court, of course, upheld the right of the defendant to call the Grand Juror to testify. In that case you see, your Honor, the veil of secrecy was lifted, but at the same time there was no atempt to question the Grand Juror on the deliberation of the Jury which are always held sacred, or on the advice of the prosecutors which are likewise held above inquiry. And those are the things which were originally sought to be protected by the statute.

In Commonwealth against Hill the Judge said, "The extent of the limitation upon the testimony of Grand Jurors is best defined by the terms of their oath of office, by which 'the Commonwealth's counsel, their fellows, and their own, they are to keep secret.'"

There are many, many cases on this, your Honor, and there are two new ones in which the Federal [14] principle, which has been laid down in so many cases that where there is a particular need, where there is a compelling necessity to avoid injustice, that the secrecy of the Grand Jury will not be observed after an indictment and that matters of testimony before the Grand Jury by witnesses may be revealed. How else could it be found, your Honor, that, for example, more than one witness was in the room at the same time which is in itself a violation of the secrecy of the Grand Jury proceedings? Or other situations he disclosed which have been revealed in the cases of the Supreme Court and of the United States Court and the various Federal Court? I have enumerable cases on this principle, your Honor, and it seems to me that there is no doubt where there is a necessity to avoid an injustice, a deep necessity, a particular need to show certain facts in order to guarantee a defendant his constitutional rights,

that the veil of secrecy must be lifted and that the Court has discretion to lift it.

In appeal to your Honor to exercise his discretion in order to grant Connor his constitutional, his statutory and his common law rights in this matter.

I will pass on now to the next motion —

The Court: Well, let me interrupt you.

Mr. Twohig: Yes, your Honor.

[15] The Court: You take the position that, notwithstanding what you called to my attention, that this motion for particulars should be allowed?

Mr. Twohig: Yes, your Honor.

The Court: And in this form?

Mr. Twohig: Yes, your Honor.

The Court: These are only interrogatories, aren't they?

Mr. Twohig: No, your Honor, they are inquiries into certain facts relating to the deliberation of the Grand Jury. They do not relate to the Commonwealth's counsel. They do not relate to the counsel of the jurors. They do not relate to any votes cast by the jurors. They relate only to certain facts. One of them is the number of session of the Grand Jury.

The Court: What difference does that make?

Mr. Twohig: It will show, your Honor, that in spite of the number of sessions of the Grand Jury at which witnesses were entertained and heard that Connor's name was never brought out by the Grand Jury on an indictment, nor any description of Connor. And that, your Honor, I think establishes an irrefutable conclusion that they had no knowledge of Connor's connection in this case in any way either as a known or an unknown person.

[16] All the Grand Jury knew from these various sessions about this alleged crime was the name of the co-defendant and whatever else they may have known about

a decision at any time that will enforce that right. However, there is no doubt, as was said in Commonwealth against Edwards, "In capitol cases, a list of the witnesses sworn before the Grand Jury in the particular case, is, under our practice, always furnished the prisoner."

So I submit, your Honor, that that motion should be allowed. And that is all I have to say this morning on these motions.

The Court: Mr. Reiser.

Mr. Reiser: Your Honor please, drawing myself to the first motions to quash and to dismiss, in 1899 the Legislature passed, which is now General Laws, Chapter 277, Section 19, "If the name of an accused person is unknown to the Grand Jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings with a reference to the fact that he was [20] indicted by the name or description mentioned in the indictment."

Now, in the case of Commonwealth v. Gedzium, 259 Mass. 453, this very problem was presented the Court and it was resolved and it was held that you could — it was a John Doe indictment. His name was later substituted and entered upon the record as the true name and the Massachusetts Supreme Court held that this was valid and the indictment should be sustained.

And in the notes in the green book, the Massachusetts General Laws Annotated, "Indictment for murder, describing defendant by fictitious name only was sufficient, under statute." Because of the statute it becomes sufficient and the statute was upheld in this particular case. The

Court permitted defendant's real name to be entered on the report describing defendant only by fictitious name.

Now, in this particular case the name of the defendant was unknown to the Grand Jury at that particular time. Certain evidence was presented to the Grand Jury partaining to the murder; witnesses testified before the Grand Jury. One of the defendants was indicted by name and the John Doe warrant was issued. Later on this man was arrested.

My Brother has introduced no evidence there [21] was not probable cause for the arrest. He's already rested, there's been no evidence whatsoever, and the burden of proof on a motion to dismiss as to evidence is upon the person presenting the motion. So, therefore, the motion to dismiss and the motion to quash in the Commonwealth's opinion should not be sustained.

Now, addressing myself to the motion for particulars. I'd like to state, as the background of this case, there was a hearing previously for a motion to obtain the minutes of the Grand Jury which was disallowed without prejudice by Chief Justice Tauro. And at that time I said in substance that from the very beginning this case has been a case of naked terror. The witnesses have been terrorized. They have been told, and one witness in particular, that —

Mr. Twohig: Your Honor —

Mr. Reiser: That defendants were going to get ahold —

Mr. Twohig: I object.

The Court: Well, I'll listen. I didn't interfere with your recitation factually or otherwise, and I'll listen to the whole matter in argument.

Mr. Reiser: They were going to get a hold of the Grand Jury notes and that the witness would get [22] the same thing as the victim.

That we have had through this entire case a terrorization of the witnesses; the witnesses are terrorized. They

are now being protected by the Commonwealth and one witness almost on a 24 hour basis.

There are other witnesses that are hiding pending this case because of the fear for their very lives.

Through the whole case the police have had difficulty obtaining the cooperation of the witnesses because of their terror. They were afraid for their lives literally. I know, because I have talked with these witnesses. And these motions for particulars are not particulars, they are interrogatories basically. My Brother wants to know the manner and means of how the crime was committed? The time, approximate time? The place, I'll be glad to give him that. But I can't go into all these details. What he wants to know basically is what happened in the Grand Jury. If your Honor wants me to, I'll go over each individual one; there are 31 of them.

The Court: 32.

Mr. Reiser: 32.

The Court: I thought they looked like interrogatories.

[23] Mr. Reiser: They are basically.

The Court: Beyond the scope of what ordinarily we consider are proper request for specifics or particulars which are only allowed to furnish the defendant and the Court reasonable knowledge of the nature and grounds of the crime charged.

Now, all these collateral matters don't seem to be in issue. They might well be in matters during a trial. I see here, "By what means," number 24.

Mr. Reiser: Perfectly agreeable.

The Court: That probably is a proper matter for particulars; 24.

I am not ruling on these now. I am merely thinking out loud.

Number 25 asks for the size and the number and all that sort of thing. I don't suppose the Commonwealth is obliged

to give that on a matter of particulars on an indictment. It might be important in the matter of a trial of identification, or having it marked as an Exhibit. But there may be something in that, on reflection, that some kind of an order might be made. Place? Number 13. Some part of that appears to be within reason. And number 32, I don't say none of the others are relevant, but those are the ones at first brush that appear to me that the [24] Commonwealth might well be ordered to particularize.

Mr. Reiser: I have no objections to those, your Honor. I mean, in the form, I may have objections, but to go into detail, what room it was, that is too much. The place, I'll tell him the place.

The Court: Well, I could draft an appropriate order.

Mr. Reiser: I would gladly give it to him without a Court order, those particular things.

Now, as far as the names of the witnesses before the Grand Jury —

The Court: How are you going to get away from the Edwards' case on that?

Mr. Reiser: I agree there except one thing. Some of these witnesses, if the Court orders and the Court feels that they should be supplied, I'd like the Court to take into consideration the danger that is inherent to a couple of these witnesses. Especially as to obtaining the addresses.

Now, if my Brother filed a motion to interview the witnesses we would supply them at a particular place, but to give him an address, that's another story.

The Court: A list of witnesses. It doesn't say anything about addresses, does it, in the statute?

[25] Mr. Reiser: The statute says; return to the Court.

The Court: Well, if I made any order I certainly would order the names impounded, if I made them available to the defendant; the names only. I haven't read the Edwards' case lately, but my recollection of it is that it's pretty

directive as far as the trial court is concerned. I don't want to fly in the face of absolute directives. I have enough difficulty handling the regular work and making decisions on those things that haven't been specifically decided and set out.

Mr. Reiser: The thing that I am more concerned about is the addresses and the whereabouts of these people. I'll state that if his Honor should, at any later time, make an order that the defendants be allowed to examine them, pre-trial, if there is an order which I would object to, but if there is one we would make them available in the Courthouse.

The Court: Anything else?

Mr. Reiser: Nothing, your Honor.

The Court: Mr. Twohig?

Mr. Twohig: Your Honor, the defendant simply wants his rights. He doesn't want any special arrangements or benefits from the prosecutor's office. He doesn't want them to go to any undue trouble [26] whatsoever on his behalf. He simply wants his rights in this case.

The Court: There are limits to what rights he's entitled to have.

Mr. Twohig: There certainly are, your Honor. But the outside limits or his rights in this case would be his immediate release because of an unlawful arrest and no indictment in this case.

The Court: How do you get away from Section 19, Chapter 277?

Mr. Twohig: Your Honor, it has no relation to this case.

The Court: Why not?

Mr. Twohig: It says a fictitious name.

The Court: Or a John Doe.

Mr. Twohig: John Doe is not a fictitious name, your

Honor. A fictitious name is a nickname or a false name which has been assumed by a defendant.

The Court: How do you get away from the Gedzium case?

Mr. Twohig: There was a description of the defendant. The Gedzium case is not interpreted as —

The Court: There is a description in the indictment? No? Well, you better believe again. There couldn't be a description in the indictment. The [27] Gedzium case, the indictment was fashioned exactly as this one was.

Mr. Twohig: I don't believe it was, your Honor, I may be mistaken.

The Court: I remember the Gedzium case very well because I was quite active in the practice of law at the time.

Mr. Twohig: Yes, your Honor.

Well, your Honor, I don't think that the Gedzium case has any application, and I don't think Section 19 has any application. There has never been a decision in which it has been stated that an indictment or a warrant without a description and based on a John Doe application was good.

The Court: Now, you are saying an indictment or warrant.

Mr. Twohig: And.

The Court: Well, the indictment is one thing, Mr. Twohig. His arrest is something else again, isn't that so?

Mr. Twohig: I claim that he has not been indicted and that it was an invalid arrest. And there has been nothing to make it valid since then. There has been no subsequent indictment. There has been no showing of probable cause either on the arrest or [28] the indictment.

The Court: That is your burden to show on a motion to quash or to dismiss that he was illegally arrested.

Mr. Twohig: I believe that the cases, I have a decision

here somewhere which states that the burden is on the prosecution, your Honor.

The Court: To what?

Mr. Twohig: To establish probable cause in an arrest. I'm pretty sure I have a decision on that.

The Court: Well, that isn't the recent statements and decisions of this Court, the highest Court in this Commonwealth and of any outside that I am aware of, but I could be in error. There's very explicit language in some case that says that it is the defendant's burden to prove.

Mr. Reiser: Commonwealth v. Roy.

Mr. Twohig: Well, I have a decision here somewhere, your Honor, but I can't find it on short notice. If I do find it I'll submit it to your Honor.

The Court: You may, yes, certainly.

Mr. Twohig: Now, before I terminate, your Honor, I would like to make the comment on this ridiculous argument about terror in this case. This is the most unfair and unjust argument that could be[29] leveled. It is without any foundation whatsoever that we know of. There hasn't been one single fact referred to even in argument to show that there has been any terror or fear instilled in anybody in this case. Here was an alleged murder that happened on May 1, 1965. Connor was at large at that time. From May 1, 1965 he lived at home in South Boston until his arrest, I think it was on August 6th. He never left the State. Went about his ordinary everyday life. Went on a couple of vacations to the Country. Came back, went with his brothers, came back. Every day out on the street associating with his friends. Seen by everybody including the police. His home is well-known. There's no secret about where he resides. The police never visited his home in all that time. There is no evidence during all that time, there is no indication whatsoever that there was any terror or fear or violence or threatened violence in this case against any

person. No person's name has been mentioned as having been threatened or instilled with fear.

The Court: Well, Mr. Reiser didn't say this man or anyone associated with him was threatening anyone.

Mr. Twohig: He didn't say anybody was threatening anyone. He didn't give us the name, if he [30] did, I didn't hear him say that any man, woman or child threatened anyone. He says there is an atmosphere of fear and terror. Fear instilled into the witnesses by whom? An animal? A human being? A man? A woman? A child? one of the defendants? An anonymous telephone call, if so, to whom? To whom? To the police? To Mr. Reiser? We don't know if he's acting on hearsay once, twice or three times. I never heard such a vague, ridiculous argument in my life in a Courtroom. We don't know who received the calls. We don't know who made the calls. Even if there were calls. We don't know. Who gave him this information about terror? Where does it come from? Perhaps it's just imaginary on his part, we don't know. We've had no facts.

Now, that sort of vague, nebulous argument about imaginary things is not sufficient, your Honor, on which either to deny or to admit any motion or any application of the testimony. The defendant should have opportunity to get the evidence which will help him to defeat this action. Who can be more helpless in a criminal case than the man that doesn't know anything about it? Than the man who was never there? The man who was picked up on suspicion?

The Court: Just a minute, the Commonwealth has the burden of proving it, doesn't it, beyond a [31] reasonable doubt, every particular? He doesn't have to prove anything. He can stay as quietly and as calmly as he appears to be at this moment and doesn't have to raise his finger or wink his eye or do anything. The Commonwealth must prove that he did that which they claim he did.

Mr. Twohig: Yes, but in the meantime they can bring him to trial. They can put him on trial for an infamous

crime, a disgraceful crime, in violation of his rights.

The Court: You don't claim that the Commonwealth and the District Attorney's office here is cutting something out of whole cloth and proceeding on charges that have no foundation in fact?

Mr. Twohig: I certainly do, Your Honor. I certainly do claim that. And I claim that I have had nothing, and the Court has had nothing to do on this point to claim otherwise.

The Court: Now, just a minute. The Court has something to indicate otherwise. A properly drawn indictment —

Mr. Twohig: A nullity.

The Court: That is a question of law, isn't it? An indictment signed by the Foreman of the Grand Jury. The Court has something.

[32] Mr. Twohig: I certainly feel that that Grand Jury was mislead, your Honor, in issuing that indictment.

The Court: Well, that is a matter of opinion I suppose. I am not being threatened, and I am not afraid.

Mr. Twohig: No, I know you are not, your Honor.

The Court: Of this or anything else. Except that my God watches me, that is the only thing I am afraid of.

So I will take the papers and give consideration to these several matters that have been presented to me in these cass and will make an appropriate order and counsel will be advised.

Mr. Twohig: Thank you, your Honor.

Mr. Reiser: Thank you.

Mr. Twohig: Your Honor, before you terminate the session, I have other matters I'd like to bring to your attention, preliminary matters I'd like to bring to the attention of the Court. May I have an extension of the time within which I can file dilatory proceedings? There is another defendant in this case and I understand he's just procured counsel.

The Court: You were given —

[33] Mr. Twohig: 30 days, your Honor, which expired Monday, and I'd like to file some others, could I have an extension of time?

The Court: I'm sure that any Court will accept any extension. But what do you specifically request?

Mr. Twohig: Well, only the time to expire on the same date as the co-defendant's time in the case.

Mr. Reiser: Co-defendant has not been arraigned yet.

The Court: So he hasn't asked for one?

Mr. Reiser: Somebody said he was arraigned yesterday.

The Court: Yes, he was as a matter of fact.

Mr. Reiser: I wasn't informed.

The Court: He was arraigned on September 13 before Mr. Justice Hudson. Mr. Balirro was appointed counsel subject to his filing an affidavit as required by rule 95, but there was no other order with respect to the time. Of course, under our rule now he has 10 days and any other additional time that the Court may grant.

Mr. Twohig: Well, undoubtedly when he files [34] his application for appointment and that is allowed he will be given a period of time.

The Court: He would have 10 days, but I don't think, Mr. Twohig, that it's necessary to extend the time to allow you to file further pleadings.

Mr. Twohig: Well then I will simply file them and let the Court deal with them.

The Court: I should think the Court would hear them. I'm sure this Court is not interested in stifling the presentment of proper motions, and I don't think the District Attorney's office would raise any serious objections to it.

Mr. Twohig: Not serious objections.

The Court: Okay. Recess.

(Hearing adjourned)

SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. S-13, 706

COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM R. DOHERTY (AND FOUR COMPANION CASES[1])

Before: Wilkins C.J., Whittemore, Cutter, Kirk and Spiegal J.J.

OPINION

August 22, 1967

WHITTEMORE, J. Donald E. Landry (Emo Landry) and James J. Connor (indicted as John Doe) were found guilty of murder in the first degree of Robert W. Davis. There was evidence to show that the crime was committed shortly before 3 A.M. on May 1, 1965. The jury recommended that the death penalty not be imposed. William R. Doherty and his wife, Janice M. Doherty, were found guilty of being accessories before the fact to murder in the first degree with recommendation that the death penalty not be imposed. Both Dohertys were also found guilty of being accessories after the fact to murder.

The trials were held subject to G.L. c. 278, §§ 33A to 33G inclusive. Most of the testimony regarding the events preceding and following the homicide was given by Elizabeth Moore. She had lived and boarded with the Dohertys and their four year old child for two years in the third or top floor apartment at 116 Dakota Street in the Dorchester district of Boston. Most of the testimony as to the actual killing came from Ronald Hayes, who had been a friend of Moore for several years and who was her companion on the night of the homicide.

Moore testified that on Friday evening, April 30, 1965, she and Hayes, in the company of the Dohertys, drank beer

[1] The cases are described in the text of the opinion.

at the Sportsman's Cafe in Dorchester. Later, she, Hayes, the Dohertys, Davis (the deceased), and his friend Ronald Edwards gathered at the Doherty apartment. The company of six had supper in the kitchen. Beer was served. Doherty and Davis left the kitchen and went into the den. Upon their reappearance, Hayes saw that Davis had a gun in his belt. Edwards then left on Davis' cryptic instruction to "Go get the queen," and "Go pick up the payroll" (according to Mrs. Doherty's testimony, "payload" or "payroll").

Hayes and Moore went to the latter's room, and while there heard noise and commotion. Moore opened the door and saw Mrs. Doherty making a telephone call. Davis and Doherty had returned to the den. On his wife's summons, Doherty again came out of the den and continued the telephone conversation which was not overheard. Doherty returned to the den. Mrs. Doherty then took the telephone to Moore's room, made a call, asked for "Emo," and, while waiting, told Hayes and Moore that Davis had two guns at Doherty's head and that she had to get someone to help him. She repeated this statement on the telephone. Doherty then entered the room again and said to his wife, "Janice, tell her this guy is Bobby Davis who's against me, if something happens before they get up, and tell him to bring his piece and to get up here." Mrs. Doherty said, "[B]ring your piece." Upon completion of the call the Dohertys left the room.

Approximately five minutes later Mrs. Doherty returned, made another telephone call and said, "Hello, Emo, what's taking you so long? Why aren't you up here? He's going to kill Billy [Doherty]. Will you please come up? Take a cab, Emo. We're at 116 Dakota Street." Mrs. Doherty asked Moore for the cab money and told Moore and Hayes that they had better leave. "There's going to be trouble. . . . Emo is coming up, and he has a big gun. . . . [H]e

knows how to use it.... [I]f you want to leave, go ahead. Get out of here." Moore and Hayes declined to leave.

Moore went downstairs to meet the cab. While there she saw Edwards returning in Edward's car with another man, Adrian Delaney. Edwards drove away. Delaney remained on the porch with Moore, who then saw a cab come up Dakota Street and stop at a side street. Two people got out of the cab and went into some nearby bushes. One of them was carrying a "violin case." The jury, from later testimony, could have inferred that these two were Landry and Connor.

Delaney pointed a gun at Moore, calling her "Mrs. Doherty." Doherty appeared on the porch from upstairs with a gun "in his waist." Doherty told Moore to "get out of there." A fight between Doherty and Delaney followed. Moore ran off the porch along the side of the house to the garage. While there, she heard a shot. Delaney ran past her down Iowa Street. She heard another shot from upstairs. Then she saw "Jimmy Connor" carrying a long case. Moore had previously met Connor through Mrs. Doherty's parents, the Bakers, who lived in the same house as the Dohertys on the second floor. Moore asked Connor what she should do. He answered, "Just stay there and be quiet." Moore saw Hayes run from the house, get in his car and leave. On her return to the house from the garage, Moore saw Davis lying on the front porch.

Hayes' testimony of events in the Doherty apartment from the time of his arrival to the time Moore went downstairs to meet the cab was, in most particulars, corroborative of Moore's testimony. While Mrs. Doherty was making the telephone call to Emo, Doherty told his wife to "Tell Emo [that] Davis did it if I am killed." In response to a question by Moore, Doherty said that Davis was asleep on the couch in the den and that he did not try to take the

guns away from Davis because he was afraid he would get shot if he woke Davis.

After Moore had gone downstairs, Hayes saw Doherty take the two guns away from Davis, who was sleeping. Both guns were Lugers. Doherty kept one. He gave the other to Hayes and told him to protect his (Doherty's) family. Doherty went downstairs. From the front porch on the third floor Hayes saw two men get out of a cab, one carrying a gun case. About the same time, a car stopped in front of the house and Hayes heard a gunshot on the porch. "Connors" came upstairs, grabbed Hayes by the throat, and pushed him against the wall. Hayes saw no weapon on Connor. Hayes told him, "I'm on your side. . . . I'm with you. I know nobody." Mrs. Doherty came into the room and said, "Not him; the one on the couch." Hayes heard someone coming up the stairs and also heard "bolt action or shotgun action or something like that." Landry came in and pointed a "rifle" at Hayes. Mrs. Doherty said, "Not him; the one on the couch." Landry "put the gun in Davis' belly," said "hey, hey" twice, and "shot him in the belly." Mrs. Doherty came running into the room and said, "Get him out of here." Landry and Connor picked Davis up, "one under each arm," dragged him to the doorway and "let him go." Shortly afterwards, Hayes left the premises. He observed blood spattered on the front stairs and passed Davis who was "sprawled out on the front porch." Hayes got into his car, drove around the corner, dropped the Luger into a sewer and went home.

Moore testified that after the shooting Doherty, his wife, Moore, and Mrs. Baker met in the Baker apartment where it was decided by all, including Moore, that they would tell the police "that two guys came up here and broke in and shot him." Moore said to Doherty, "I'll be a witness for you, Billy. I know you didn't shoot him." Doherty called the police. When the police arrived about 3 A.M. on Satur-

day, May 1, Doherty was on the porch, standing beside Davis' body. Doherty told the police that he had been in a fight, had run from the porch and found Davis' body when he returned. Subsequently, the medical examiner reported that Davis died of a shotgun wound in the chest.

1. We discuss first the assignments of error relating to the denial of the Dohertys' motions, filed at the close of the evidence, for directed verdicts of not guilty.

The evidence was insufficient to warrant a verdict of guilty against Doherty on the charge of being an accessory before the fact to murder. The Commonwealth's evidence showed that Davis had imperiled Doherty's life. The only words used by Doherty to his wife while she was telephoning were, "tell her this guy is Bobby Davis who's against me, if something happens before they get up, and tell him to bring his piece and to get up here," and "Tell Emo [that] Davis did it if I am killed." Doherty's words were, at most, a call for armed help to be used if needed. Before any help arrived, Doherty disarmed Davis who was asleep. Thus, the situation for Doherty had changed from one of imminent peril to one of defensive security in his own dwelling as indicated by his giving one of Davis' Lugers to Hayes with the words, "Protect my family." Doherty had then gone downstairs to the front porch where he encountered Delaney pointing a gun at Moore, who was awaiting the arrival of the armed help. Moore testified that Doherty's ensuing fight with Delaney was to protect her from bodily harm, and that she had written to Doherty while he was in jail that he had saved her life. The testimony shows that Doherty had left the scene after a shot was fired during the fight with Delaney. It is speculative what Doherty would have done had he remained on the porch or on the scene until Landry and his companion arrived. The Commonwealth failed to establish beyond a reasonable doubt that Doherty counseled or procured the murder of Davis. G.L.

c. 274, § 2. A verdict of not guilty should have been directed for Doherty on the indictment charging him with being an accessory before the fact to murder. *Commonwealth* v. *O'Brien,* 305 Mass. 393, 401. *Commonwealth* v. *Carter,* 306 Mass. 141, 147. *Commonwealth* v. *Fancy,* 349 Mass. 196, 201.

On the other hand, there was no error in the denial of Mrs. Doherty's motion for a directed verdict on the indictment charging her with being an accessory before the fact to murder. The evidence most favorable to the Commonwealth shows that she placed the calls for armed assistance, was present in the apartment when the armed help arrived, and saw Landry pointing a gun directly at Hayes. The jury could find from this evidence, and from her prior statements to Moore, that she was fully aware of Landry's intentions. She made no effort to explain to Landry or his companion that circumstances had changed since she had placed the telephone calls for armed assistance. Rather, she pointed out Davis to Landry, who then killed Davis. The evidence warranted a finding that she was guilty as an accessory before the fact to murder.

There was likewise no error in the denial of the Dohertys' motions for directed verdicts on the charge of being accessories after the fact to murder. Mrs. Doherty's brief does not expressly argue the point. The ground for Doherty's motion was that any acts of Doherty sufficient to constitute the offence were directed toward his wife, so that he had a defence under G.L. c. 274, § 4. The indictment charges that he "did harbor, conceal, maintain and assist" the principal felons. The fact that the same acts also assisted his wife, charged with being an accessory before the fact, does not preclude his conviction under the indictment.

2. We now turn to Connor's challenge to the validity of the indictment charging him with murder. As returned by the grand jury on August 4, 1965, the indictment for mur-

der ran against Landry "and John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown." On August 9 the Commonwealth filed a motion to amend the indictment by substituting the name of James J. Connor for John Doe. A hearing was held at which no evidence was introduced. The motion was allowed. On August 10, 1965, the docket entry of August 9 was "corrected so as to read as follows: Commonwealth files motion to amend indictment. Court . . . having determined that true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name."

On September 10, 1965, Connor filed motions to quash and to dismiss the indictment. The grounds for the motions were, inter alia, that there is nothing in the indictment to indicate that John Doe was ever described to the grand jury in any manner, that Connor has never been indicted by the grand jury, and that there is nothing in the warrant based upon the indictment to indicate in any way that the "John Doe" intended to be arrested was Connor. After a hearing on September 24, the motions were denied and exceptions taken. There was no error.

General Laws c. 277, § 19, provides that "If the name of an accused person in unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

"The procedure [of entering the true name on the record] is somewhat analogous to specifications required by

G.L. c. 277, § 40, which must be furnished as matter of right and which must be read with the indictment for a full description of the crime charged." *Commonwealth* v. *Gedzium,* 259 Mass. 453, 457. The allowance of the motion "presupposes the finding by the court of all the facts essential thereto to the end that no injustice be done to any defendant" (*ibid,* p. 461). The judge could act on the district attorney's representations. By the presentation of the motion, these were that the man described in the testimony before the grand jury and designated as John Doe was Connor. While evidence was not required, a statement by the district attorney to make express the implications of the motion, or the presentation of testimony or of affidavits, would have been appropriate and desirable.

This was not an indictment in blank. In the context of the murder indictment and the other indictments the name "John Doe" identified the person associated with Landry and the Dohertys in the crime of May 1, 1965. The murder indictment was of "Donald E. Landry alias Emo Landry [and] John Doe." The inescapable inference is that the complicated facts of, and related to, the killing of Davis were placed before the grand jury. The "John Doe" of the indictment was the man who acted a particular and described part. Under the *Gedzium* case, it is no longer necessary that the indictment itself give "the best description possible of the person to be arrested." *Commonwealth* v. *Crotty,* 10 Allen, 404, 405. There was no violation of the "great principle asserted by the Declaration of Rights . . . that no man shall be put to answer a criminal charge until the criminating evidence against him has been laid before a grand jury and they have found probable cause" — quoted in the *Gedzium* case (p. 459) from *Commonwealth* v. *Holley,* 3 Gray, 458, 459-460. Connor became answerable to the indictment of August 4, 1965, when his name was entered on the record on August 9, 1965. On

August 10, 1965, a copy of the indictment was sent to the sheriff for service on Connor. This is a stronger case on its facts than the *Gedzium* case where all three defendants were indicted under fictitious names.

3. The defendants Landry and Mrs. Doherty have assigned errors based on their inability to interview the witness Moore in advance of trial, and three of the defendants have assigned and argued similar errors based on their inability to interview the witness Delaney. All the defendants have assigned as error the refusal of the trial judge to permit them to inspect the testimony given by Moore before the grand jury which was sitting in June, 1965, and before another grand jury sitting in August, 1965. We treat these assignments of error together.

Prior to trial, the witness Moore was held in protective custody by the prosecution. In response to a motion filed and allowed, Landry's counsel appeared at the court house at Boston on November 16, 1965, for the purpose of interviewing Moore. The prosecutor and an assistant and a stenographer were in atendance.

At the outset of the interview, Moore stated that she had knowledge of the facts and circumstances of the charge against Landry. Landry's counsel then asked the witness: Q. "And have you testified concerning those matters before the Grand Jury?" Before the witness could answer the question, the prosecutor interrupted. In the colloquy between counsel which followed, the prosecutor made clear his position that Landry's counsel had no right and would not be permitted to question the witness with respect to anything which took place before the grand jury. As a result of this colloquy, the attempted interview was concluded without further questioning.[2]

---

[2] The interview ended with the following exchange between counsel. COUNSEL FOR LANDRY: "I feel you are exercising duress and collusion, as far as this witness is concerned." ASSISTANT DISTRICT AT-

On February 9, 1966, the witness Moore appeared in court in connection with Landry's motion to suppress her testimony. The judge addressed the witness as follows: "[W]ith reference to submitting to interview, the Court . . . does not order you to answer any questions put to you by them. Now, the decision is up to you. You may decide what you want to do." The witness answered that she did not "care to go into it at this time." Mrs. Doherty's motion to interview the witness was similarly dealt with. The judge denied both motions. Landry's counsel brought to the judge's attention a copy of the transcript of the attempted interview on November 16, 1965, which was annexed to his motion. He argued that the witness' state of mind was due to the interference and directions of the prosecutor which should be neutralized by the judge or by questions by defence counsel.

Later, during the same hearing, counsel for Landry presented a motion in writing for inspection of the grand jury minutes. The stated ground for the motion was, in part, his inability to obtain an interview with the witness Moore. The prosecutor argued that the motion should be denied "in the interest of safeguarding these witnesses." He stated that "[o]ne of the assurances that I gave the witnesses before they went in the grand jury is that proceedings of the grand jury would be secret, and that the only tme that they would have to worry about any testimony would be in the open courtroom during the course of the trial." The judge denied the motion as matter of discretion and counsel for Landry excepted.

The first opportunity defence counsel had to question Moore came one month later during their cross-examination

---

TORNEY: "You can ask her any questions except what went on in the Grand Jury." COUNSEL: "You are no one to say what questions I can or cannot ask this witness. You have no right. You don't own this witness." ASSISTANT DISTRICT ATTORNEY: "Anything to do with the Grand Jury is secret."

of her at the trial in March, 1966. It then developed that Moore had given perjured testimony in her appearance before the June grand jury. Moore admitted under cross-examination that the testimony which she had given before the grand jury in June, 1965, was different from the testimony which she had given before the grand jury in August, 1965, and was different from the testimony she had given on direct examination to the trial jury. She admitted that she had given at least two different stories of the events which had taken place at 116 Dakota Street on May 1, 1965. She testified that she had "told the District Attorney's office" that when she was before the first grand jury she had "committed perjury."

Upon eliciting this testimony, defence counsel requested that they be given an opportunity to examine the testimony given by Moore before the two grand juries. The judge declined so to order. All the defendants duly excepted. The judge then ascertained that the prosecutor had one copy of the minutes of the first grand jury and no copy of the minutes of the second grand jury. He said to defence counsel: "[Y]ou can get . . . [this] in evidence . . . by getting the stenographer." He instructed the prosecutor to inform defence counsel who the stenographer was. To defence counsel he said, "[Y]ou can . . . have him available and the minutes only in relation to . . . this witness."

In respect of the attempted interviews with the witness Delaney, the judge told the witness that he himself was to decide whether he wished to discuss the case with counsel for the defendants. Delaney replied, "I don't wish to say anything."

There was no error in denying the defendants' motions for inspection of Moore's grand jury testimony. This court has held that granting permission to examine grand jury minutes rests in the discretion of the judge. *Commonwealth* v. *Balliro,* 349 Mass. 505, 518. See *Commonwealth*

v. *Giacomazza,* 311 Mass. 456, 462; *Commonwealth* v. *Galvin,* 323 Mass. 205, 211. Where it is alleged that an inconsistency exists between a witness' testimony at the trial and his testimony before the grand jury, it is appropriate for the trial judge to read the minutes to determine if there is an inconsistency, and, if it is found to exist, to permit defendant's counsel to examine the grand jury testimony. *Commonwealth* v. *Kiernan,* 348 Mass. 29, 36, cert. den. sub nom. *Gordon* v. *Massachusetts,* 380 U.S. 913. *Commonwealth* v. *Abbott Engr. Inc.* 351 Mass. 368, 578-579. We have indicated, citing *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400, that where a particularized need for an examination of the grand jury minutes is shown which outweighs the policy of secrecy, the defendant may be entitled to them. *Commonwealth* v. *Ladetto,* 349 Mass. 237, 244-245. See also *Commonwealth* v. *Giles, ante,* 1, 18-19.

A particularized need having been shown, defendants' counsel were entitled to inspect the grand jury minutes, so far as available and relevant, under the reasonable supervision of the trial judge. The minutes of the first grand jury were, it appears, available. The judge's ruling, however, did not deprive the defendants of access to any of the minutes and they were not prejudiced. Having failed to pursue the course indicated, the defendants may not prevail in their exceptions to the denial of the motions to inspect the minutes.

Nor do we discern reversible error in respect of the denial of the motions to interview Moore and Delaney. The decision whether to be interviewed lay with the witnesses. The judge appropriately could have informed them, additionally, that (1) each might have counsel, (2) the defendants were entitled to interview witnesses and should not be deprived of the opportunity by whim or caprice, (3) prior testimony of the witnesses before the grand jury and con-

versations with the district attorney were not reasons for declining to talk with defendants' counsel, and (4) each might give weight to the risk of self-incrimination or personal danger in deciding whether to talk. However, much must be left to the discretion of the judge, who saw and heard the witnesses. If a witness elected to be interviewed, we think the defendants' counsel were entitled to talk with the witness, each separately and without the presence of the prosecutor or police officers. See *Commonwealth* v. *Balliro*, 349 Mass. 505, 516-517.

The circumstances that require protective custody strongly suggest the risk of intimidation and other improper pressures. That no such pressures would be exerted or suggested by counsel would not relieve the witness of all concern. We think it very unlikely that remarks by the judge as requested, to neutralize what the prosecutor may have said, would have altered Moore's decision to keep still and avoid possible trouble. The judge must take reasonable steps to protect not only the witness but also the Commonwealth and the integrity of its case. He may in his discretion require that a stenographer be present at any interview with a witness in protective custody.

4. Counsel for Mrs. Doherty moved before trial that paragraphs 2 and 3 of the bill of particulars filed by the prosecution in response to motions by Mrs. Doherty[3] be struck, and excepted to the denial of the motion. Counsel for the principals Landry and Connor, who were tried jointly with Mrs. Doherty, correctly anticipating that the particulars filed in response to Mrs. Doherty's motions would be read with the indictments and would be usable against them, also moved to strike paragraphs 2 and 3 of

[3] The attorney who represented Mrs. Doherty when the motions for particulars were filed was not appointed by, and was not eligible for appointment by, the Superior Court under Rule 95 of the Superior Court (1954). The motion to strike was filed by Mrs. Doherty's court appointed counsel.

the bill of particulars and excepted to the denial of their motions. We discern no error in the denial of the motions. The specifications described "blood [that] spurted out of his chest like water from a faucet." In this and some other respects deletion would not have been inappropriate. But we are dealing with murder, apparently in cold blood, by a shotgun held to the victim's chest. The essential horror of the crime makes incidental whether blood spurted or did not spurt.

5. The defendants Landry and Connor assign as error the trial judge's denial of their motions for severance. One of the grounds advanced by Landry and Connor for severance is the prejudicial effect which the particulars filed in response to Mrs. Doherty's motions had upon their trials. That ground is disposed of by what we have said in respect of the bills of particulars.

The other ground advanced for severance by Landry and Connor, and by Mrs. Doherty in her motion for a mistrial, is the denial of their constitutional right to have other co-defendants testify on their behalf during trial. Each contends that if severance were granted, the other defendants would be available to testify during his or her trial. This does not necessarily follow, and is not sufficient reason for requiring a severance. *Gorin* v. *United States,* 313 F. 2d 645-646 (1st Cir.) cert. den. 379 U.S. 971. *United States* v. *Kahn,* 366 F. 2d 259, 263-264 (2d Cir.) cert. den. 385 U.S. 948. Whether severance should be granted was within the discretion of the judge. *Commonwealth* v. *Fancy,* 349 Mass. 196, 204-205. There was no error.

6. The defendants Landry and the Dohertys contend that the evidence was such that the judge erred in permitting a finding that the killing was with extreme atrocity or cruelty. General Laws c. 265, § 1, provides: "Murder committed with deliberately premediated malice aforethought, or with extreme atrocity or cruelty, . . . is murder in the

first degree." The law applicable to the issue was stated by the judge in unexceptionable language, following *Commonwealth* v. *Devlin,* 126 Mass. 253, 255.

The testimony of the murder and how it was done was given by Hayes. That testimony being accepted, as was necessary for a finding of guilt, established beyond doubt deliberately premeditated action. We think it unnecessary, therefore, to weigh precisely whether the jury could find that Davis was unconscious of all the callous cruelty of the murderers in arousing or attempting to arouse a sleeping or dozing victim, and then shooting him at close range, dragging him to the doorway and there "let[ting] him go," that is, as the jury could infer, dropping him down the stairs. Hayes testified that Davis "woke up for a second and then there wasn't a sound." The testimony did not fix the exact time of death. The medical examiner testified that death was the "result of a gunshot wound of chest with massive hemorrhage." The shot tore through the aorta. The jury could conclude that Davis had some awareness of what was being done to him. We discern no reversible error. See *Commonwealth* v. *Devereaux,* 256 Mass. 387, 394 (shooting, and two or three blows with a gun butt); *Commonwealth* v. *Knowlton,* 265 Mass. 382, 388 (beating and rape). In the *Knowlton* case, we held that the "degree of atrocity or cruelty . . . must be considered as aggravated and extreme. The nature of a question of this kind is such that it must largely be left to the determination of the jury. . . . [T]he evidence [however] must be sufficient to justify . . . submitting the case to the jury."

7. Moore testified on direct examination that she had never known Davis prior to the night he was killed. Counsel for Landry sought to introduce evidence that there was a holdup at the office where Moore was employed while Moore was out to lunch, that Moore asked her employer for permission to accompany him to the police station, that at

the police station her employer had picked out Davis as the holdup man and had shown his picture to Moore, and that Moore had expressed some interest in the picture. All of this took place three days before Davis was shot to death. The evidence was offered to attack Moore's credibility. The judge refused to admit the evidence. All the defendants excepted. Only the defendant Connor has argued the exception. While the defendants are entitled to reasonable latitude in developing inconsistencies in a witness' testimony, the extent to which collateral matters shall be explored is in the discretion of the judge. We think the evidence was admissible but we see no reversible error.

8. We see nothing in the contention that Doherty's talk with the police at his house when they came in response to his call was inadmissible. He was not under arrest. The police asked him what had happened.

9. The judgment against Doherty for being an accessory before the fact to murder is reversed and judgment is to enter for Doherty on the underlying indictment. The other judgments are affirmed.

So ordered.

Kirk, J. (dissenting) Mr. Justice Spiegel and I are unable to agree with the views expressed in the majority opinion which bear heavily upon the fundamental rights of an accused. We believe that (1) the prosecutor's interference with the defendants' attempted interview of Moore, and (2) the judge's withholding of Moore's grand jury testimony from the defendants require that the judgments in all the cases be reversed and the verdicts set aside. We further believe that (3) the "John Doe" indictment under which Connor was convicted must be quashed.

1. In *Commonwealth* v. *Balliro,* 349 Mass. 505, 516, this court, citing art. 12 of the Declaration of Rights of our Constitution, stated that "counsel for a defendant should be accorded, *as of right,* an opportunity to interview pro-

spective witnesses held in the custody of the Commonwealth. Witnesses belong neither to the Commonwealth nor to the defence" (emphasis supplied). "It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial." *Id.* at 517-518.

The defendants' attempt to interview Moore was made four months after our decision in the *Balliro* case. During the attempted interview the defence was not permitted to elicit from Moore an answer to any question which the prosecutor did not approve. We see no difference in principle between refusing to grant a defendant physical access to the witness (*Commonwealth* v. *Balliro*, 349 Mass. 505, 516) and refusing to permit defendants, as was done in the present case, to get answers to questions put to the witness. In either case, the right to interview the witness is unwarrantably controlled by the prosecution.

At the court hearing which followed the abortive interview, the prosecutor attempted to justify his actions by unsupported allegations that Moore was in constant danger of reprisals from the defendants. That this is not a sufficient reason for depriving a defendant of his right to interview a prospective witness was clearly stated in the *Balliro* case, where the risks to the witnesses were not merely alleged but were evidenced by past acts of the defendants: "That the witnesses, as the Commonwealth argues, were 'victims' of the acts of the defendants does not alter the defendants' rights." 349 Mass. at 518.

We believe, therefore, that where, as in the present cases, it appears that the prosecutor has interfered with the defendants' attempts to interview a witness in protective custody, the judge is under an affirmative duty to neutralize the effect of the prosecutor's interference by appropriate action. The judge could have done so by granting the defendants' pre-trial requests to examine Moore's grand jury

testimony. We are now, however, left to speculate what the posture of the defence would have been if the prosecution had not interfered with the defendants' efforts to interview the witness, or if the judge had taken appropriate action to counteract the prosecutor's interference. *Commonwealth* v. *Balliro,* 349 Mass. 505, 517. In our view, the defendants have been so prejudiced in the preparation and presentation of their defence as to require that new trials be granted.

2. The defendants were entitled to examine Moore's grand jury testimony. At the trial, Moore was the key witness for the prosecution. The fate of all the defendants hung on her testimony. The inconsistency between Moore's grand jury testimony and Moore's trial testimony was not merely alleged, but was proved in open court. Cf. *Commonwealth* v. *Abbott Engr. Inc.,* 351 Mass. 568, 578-579. Her public confession that she committed perjury before the grand jury does not establish the truth of her testimony before the trial jury. In these circumstances, the defendants' "particularized need" for inspecting Moore's grand jury testimony and their consequent right to do so is self-evident. *Commonwealth* v. *Ladetto,* 349 Mass. 237, 244-245. See *Commonwealth* v. *Giles, ante,* 1, 18-19, 22. *United States* v. *Youngblood,* 379 F. 2d 365 (2d Cir.). Nothing less than affording defence counsel fair opportunity to examine and evaluate Moore's grand jury testimony could suffice. "The determination of what may be usuful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States,* 384 U.S. 855, 875.

The narrow issue, therefore, is whether the judge, in permitting the defendants merely to call the stenographer, was granting the defendants the equivalent of what they were entitled to and had requested. We think not. The judge repeatedly denied the defendants' requests to examine

Moore's grand jury testimony. When the judge did authorize the defendants to call the stenographer, he expressly refused to make the grand jury minutes available to counsel even though the defendants' particularized need for them had been established. It can hardly be said, therefore, that the judge, in permitting the defendants to call the stenographer, thereby intended that they should be able to accomplish what he had often expressly denied them. The defendants were not required to accept less than that to which they were entitled. Having seasonably saved their exceptions, they should now be entitled to examine Moore's grand jury testimony for purposes of a retrial.

3. We believe there was error in the denial of Connor's motion to quash the indictment which, several days prior to Connor's arrest, was returned against "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown." We recognize that the judge who denied the motion to quash understandably relied upon the holding in *Commonwealth* v. *Gedzium,* 259 Mass. 453. Our opinion is, first, that the *Gedzium* case cannot withstand analysis on the constitutional issue, and second, that the *Gedzium* case is distinguishable from and does not support the case before us.

Under art. 12 of the Declaration of Rights of our Constitution " 'no *person* . . . shall be held to answer for a capital or otherwise infamous crime . . . unless *he* shall have been previously charged on the presentment or indictment of a grand jury.' 2 Kent Cor. 12" (emphasis supplied). *Jones* v. *Robbins,* 8 Gray, 329, 344-345. The fundamental prerequisite to a valid indictment, that the grand jury intend to indict a specific person whose identity is known to them, is immutable. An indictment returned by the grand jury must be "an indictment found in the usual course of proceedings in pursuance of the methods of conducting the deliberations of grand jurors established by generations of

procedure in England and in this Commonwealth." *Commonwealth* v. *Harris,* 231 Mass. 584, 587. *Jones* v. *Robbins,* 8 Gray, 329, 342-343. *Commonwealth* v. *Woodward,* 157 Mass. 516.

Tested by the foregoing constitutional principles, the indictment under which Connor was tried and convicted was fatally defective. The grand jury's averment under oath in the indictment that no better description of the person intended to be indicted was known to them than the name "John Doe" forecloses the possibility that they knew the identity of the person they intended to indict. The name "John Doe" gives no clue to identity. Standing alone it is synonymous with anonymity. The indictment of John Doe is the indictment of anyone. The indictment of anyone is the indictment of no one. The indictment of no one is an indictment in blank. The indictment as returned, therefore, subjected Connor to a public trial before the grand jury had determined in the first instance that probable cause existed to believe that *he* committed the crime charged in the indictment. Because the defect is apparent on the face of the indictment the objection was properly raised by motion to quash. G.L. c. 278, § 17.

We do not believe that G.L. c. 277, § 19, authorizes the procedure followed in Connor's case. We think the statute applies only where the indictment clearly shows that the grand jury intended to indict a particular person whose identity was known to them although his true name may not have been known. See, e.g., *Commonwealth* v. *Dedham,* 16 Mass. 141; *Commonwealth* v. *Lewis,* 1 Met. 151; *Turns* v. *Commonwealth,* 6 Met. 224, 235; *Commonwealth* v. *Butler,* 1 Allen, 4; *Commonwealth* v. *Darcey,* 12 Allen, 539; *Commonwealth* v. *Fredericks,* 119 Mass. 199. To hold that the "John Doe" indictment under which Connor was tried and convicted is authorized by G.L. c. 277, § 19, would effectively nullify the limitations on criminal proceedings con-

tained in G.L. c. 277, § 63. The procedure would permit a grand jury to return an indictment whenever they had probable cause to believe that a crime had been committed without any inquiry into *who* committed the crime. It would no longer suffice that a person who has committed a crime remain undetected for the period of time set forth in G.L. c. 277, § 63. It would also be necessary that the acts constituting the crime likewise be not detected for the prescribed period.

In any event, the failure of the indictment to satisfy the constitutional requirement that the grand jury determine in the first instance that probable cause existed to believe that *Connor* committed the crime charged cannot be cured by any action allegedly authorized by G.L. c. 277, § 19. It is axiomatic that a constitutional guaranty cannot be eradicated by statute. "The legislature may change . . . [the indictment] in *form*, but cannot change the *substance* of its material averments without impinging upon constitutional guarantees" (italics in original). *State* v. *Terry*, 109 Mo. 601, 614.

What we have said with respect to the "John Doe" indictment under which Connor was tried and convicted applies with equal force to the "John Doe" indictment in *Commonwealth* v. *Gedzium*. In the *Gedzium* case, the court felt able to leap the constitutional barrier by the statement that "Such allowance [of the motion to enter the true name of the defendant upon the record] presupposes the finding by the court of all the facts essential thereto to the end that no injustice be done to any defendant" (p. 461). In the case before us, there is no evidence that would justify our indulging in such a statement. The stark reality of the situation is that we have an indictment for murder returned by the grand jury in blank, leaving it to the prosecutor later to identify the person to be charged, and to enter his name, with the acquiescence of the judge, on the record.

Because the "John Doe" indictment under which Connor has been tried was fatally defective, all proceedings taken in reliance upon the indictment are void. To say that a guilty verdict rendered by a petit jury cures the fatal defect in the indictment would destroy the right of every citizen to the interposition of a grand jury in the first instance, guaranteed by art. 12 of the Declaration of Rights. Connor made timely objection to the procedure. Accordingly, in the case against Connor the judgment should be reversed, the verdict set aside, and the indictment quashed.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 10 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

70-96

No. ~~1454~~

PHILIP J. PICARD,
PETITIONER,
v.

JAMES J. CONNOR,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General
Chief, Appellate Section
CHARLES E. CHASE
Assistant Attorney General

Of Counsel:
BARBARA A. H. SMITH

Blanchard Press, Inc., Boston, Mass. — Law Printers

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Questions Presented	2
Prior Proceedings	2
Argument	3
I. The Court of Appeals Erred in Finding that the Respondent Had Exhausted His State Remedies and It Should Have Abstained from Deciding the Case on an Issue Never Raised in the State Courts	3
II. Application of Mass. Gen. Laws c. 277, Sec. 19 to the Circumstances of this Case Did Not Involve a denial of equal protection in violation of the United States Constitution	8
III. The United States Court of Appeals erred in construing a state statute which does not involve any federal constitutional elements	12
Conclusion	16
Appendix A	18
Appendix B	25
Appendix C	26

Table of Citations

Cases

Brady v. *State of Maryland*, 373 U.S. 83 (1963)	17
Cardinale v. *Louisiana*, 349 U.S. 437 (1969)	7
Chicago v. *Fieldcrest Dairies*, 316 U.S. 168 (1941)	7

Page

Cody v. *Page*, 296 F.Supp. 961 (W.D. Okla. 1969) 16
Commonwealth v. *Binkiewicz*, 342 Mass. 740 13
Commonwealth v. *DiStasio*, 249 Mass. 273 13
Commonwealth v. *Doherty*, 353 Mass. 197 2
Commonwealth v. *Gedzium*, 259 Mass. 453, 156 N.E.2d 890 (1927) 9, 12
Darr v. *Buford*, 339 U.S. 202 (1950) 5
Dye v. *Socks*, 279 F.2d 834 (6th Cir. 1960) 13
Hurtado v. *California*, 110 U.S. 516 (1883) 13, 14, 15
James v. *Copinger*, 428 F.2d 225 (4th Cir. 1970) 5
Jones v. *Robbins*, 74 Mass. (8 Gray) 329 (1857) 9
Lem Woon v. *State of Oregon*, 229 U.S. 586 (1913) 14, 15
Lewis v. *State of Oklahoma*, 304 F.Supp. 116 (W.D. Okla. 1969) 16
Lindsley v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911) 11
Lyle v. *Edison*, 182 F.2d 345 (8th Cir. 1950) 16
Morford v. *Hocker*, 394 F.2d 169 (9th Cir. 1968) 13
Ocampo v. *United States*, 234 U.S. 91 (1919) 15
Railroad Commission of Texas v. *Pullman Co.*, 312 U.S. 496 (1940) 6
Reetz v. *Bozanick*, 397 U.S. 82 (1970) 7
Stefanelli v. *Minard*, 342 U.S. 117 (1951) 7, 8
United States ex rel. Almieda v. *Rundle*, 255 F.Supp. 936 (D.C. E.D. Pa., 1963), cert. den., 393 U.S. 863 (1968) 17
United States v. *Campbell*, 235 F.Supp. 94 (E.D. Tenn. 1964) 13
United States v. *Eskow*, 179 F.Supp. 556 (S.D.N.Y. 1968) 14
United States ex rel. Kesser v. *Fay*, 232 F.Supp. 139 (D.C.S.D.N.Y. 1964) 4
United States ex rel. Morrison v. *Foster*, 175 F.2d 495 6

Page

United States ex rel. Pollock v. *Denno*, 183 F.Supp. 514 (D.C.S.D.N.Y. 1960) 4
United States v. *Fawcett*, 115 F.2d 764 (3rd Cir. 1940) 13
United States v. *Silverman*, 132 F.Supp. 820 (D.Conn. 1955) 14
Williams v. *Page*, 289 F.Supp. 661 (E.D. Okla. 1968) 16
Younger v. *Harris*, —— U.S. ——, 8 Cr.L. 3103 7
Zwickler v. *Koota*, 389 U.S. 241 (1967) 7

Statutes

28 U.S.C. 1254(1) 1
2241(c)(3) 12
2254 2
2254(b) 4
2281 5
2284 5
Massachusetts General Laws:
c. 231A 7
c. 277, §19 ..... 2, 3, 5, 7, 8, 9, 10, 13
Ariz. Rev. Stat. Rule 117 6
Calif. Penal Code Sec. 953 6
Idaho Code, 19-1412 6
Iowa, Code Anno. Sec. 773.8 6
La., Code of Criminal Procedure, T.T. 13, Ch. 2, Art. 466 6
Nev. Rev. Stat., Ch. 174, Sec. 105 6
New York, Code of Criminal Procedure Sec. 277 6
Rhode Island Criminal Procedure, 12-12-2 6
Okla. Stat. Anno. 22 Sec. 409.3 6
So. Dakota, Compiled Laws, 1967 Anno. Crim. Procedure 23-32-12, 13 6

Page

Constitutional Provisions

United States Constitution:
Fifth Amendment 12
Fourteenth Amendment 3, 4, 5, 10
Massachusetts Declaration of Rights, Article XII 8, 9, 10

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No.

PHILIP J. PICARD,
PETITIONER,

v.

JAMES J. CONNOR,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The opinion of the court below (App. A) is reported at 434 F.2d 673. The opinion of the district court (App. C) is reported at 308 F. Supp. 843.

Jurisdiction

The judgment of the court below was entered on December 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statute Involved

MASSACHUSETTS GENERAL LAWS, c. 277,

§ *19. Name of accused person: description by fictitious name; entry of true name.* If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

Questions Presented

1. Whether the Court of Appeals erred in finding that the respondent had exhausted his state remedies as required by 28 U.S.C. 2254?
2. Whether application of Massachusetts General Laws, ch. 277, §19 in the circumstances of this case resulted in a denial of equal protection in violation of the Fourteenth Amendment to the United States Constitution?
3. Whether the Court of Appeals erred in finding a state statute unconstitutional as applied to the respondent where application of said statute did not raise any federal constitutional questions?

Prior Proceedings

Respondent, James J. Connor, was convicted in the Superior Court of Suffolk County of murder in the first degree. He was sentenced to life imprisonment. The conviction was affirmed by the Massachusetts Supreme Judicial Court on August 22, 1967. *Commonwealth* v. *Doherty,* 353

Mass. 197. On or about December 18, 1968, respondent, Connor, filed a petition for a writ of habeas corpus in the United States District Court, District of Massachusetts. On January 16, 1970, that court dismissed the petition after a hearing. On May 28, 1970, respondent, Connor, filed an appeal from the decision of the United States District Court in the United States Court of Appeals. On December 10, 1970, the Court of Appeals vacated the judgment of the district court and remanded the case with instructions to grant the writ "unless within a reasonable time set by the district court [Connor] is indicted by the Commonwealth." The decision was based on a finding that Mass. General Laws ch. 277, §19, permitting the amendment of a 'John Doe' indictment to show the true name of the defendant, violated the Equal Protection Clause of the Fourteenth Amendment.

The Commonwealth of Massachusetts now petitions to the Supreme Court of the United States for a writ of certiorari to review that decision.

Argument

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE RESPONDENT HAD EXHAUSTED HIS STATE REMEDIES AND IT SHOULD HAVE ABSTAINED FROM DECIDING THE CASE ON AN ISSUE NEVER RAISED IN THE STATE COURTS.

The argument that the application of Mass. General Laws ch. 277, §19 to the respondent violated his constitutional right to equal protection was not presented to the Supreme Judicial Court of Massachusetts. Nor, did respondent make this claim in his petition for a writ of habeas corpus before the United States District Court. Rather, this argument was *first advanced* by the United

States Court of Appeals. It was never urged by respondent, Connor.

It is settled that exhaustion of state remedies is a prerequisite to federal habeas corpus jurisdiction.

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such person ineffective to protect the rights of the prisoner." 28 U.S.C., Sec. 2254 (b).

The exhaustion doctrine is designed to allow state courts the first opportunity to correct any errors which may have occurred in the state criminal process before the federal courts intervene. It is a rule of comity and not of jurisdiction.

In the instant case, although the respondent alleged in the state court that the indictment charging him with murder was invalid in that there was no description indicating that he was the 'John Doe' named in the indictment, he *never* advanced the theory that the Massachusetts procedure governing 'John Doe' indictments violated the Equal Protection Clause of the Fourteenth Amendment.

It is equally well settled that the exhaustion doctrine encompasses not only exhaustion of the procedural steps available, but also the raising in state courts of the point upon which jurisdiction of the federal court may be predicated. *United States ex rel. Pollock* v. *Denno,* 183 F. Supp. 514 (D.C.S.D., N.Y., 1960); *United States ex rel. Kessler* v. *Fay,* 232 F. Supp. 139 (D.C.S.D., N.Y., 1964). The Court of Appeals decided this case on an equal pro-

tection basis, a point never raised in either the state courts or the United States District Court. Indeed, the Court of Appeals itself first advanced the thory of the Equal Protection clause violation.

The claim that respondent's conviction violated the Equal Protection Clause of the Fourteenth Amendment should be presented to the state courts first. See *James* v. *Copinger*, 428 F.2d 225, (4th Cir., 1970). This Court stated in *Darr* v. *Buford*:

> "As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solutions was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. 339 U.S. 202, 204 (1950)."

The rationale underlying the doctrine of exhaustion is quite similar to the rationale upon which the doctrine of abstention in proceedings brought under 28 U.S.C. §§2281, 2284 is based. The same valued principles of federalism and comity apply.

The decision in the instant case is that Massachusetts General Laws, ch. 277, §19 is unconstitutional as applied to the respondent. Although there is nothing in the decision of the Court of Appeals to prevent Massachusetts from indicting other persons in accord with the statute in question, future 'John Doe' indictments must now be clouded by the threat of federal court intervention at each

instance in which this state criminal procedure is exercised.

This decision will affect other states as well. Ten other states have statutes similar or identical to the Massachusetts statute in question.[1] The cloud that has been placed on the criminal procedure of all these states will surely give rise to numerous litigation and conflicting judicial decisions. Indeed, the instant decision has already created a conflict in the federal circuits. In 1949, the Court of Appeals for the Second Circuit, held that the state of New York's use of a 'John Doe' indictment did not constitute a denial of equal protection of the laws

> "because affirmance of [Morrison's] conviction shows that under like circumstances defendants in other cases would be subject to the same legal rules as were applied in his case." *United States ex rel. Morrison* v. *Foster*, 175 F.2d 495, 498.

In the *Foster* case, the New York courts had the opportunity to interpret their 'John Doe' statute vis-a-vis the equal protection argument. Ibid., at 497. The Massachusetts courts have not been granted that opportunity in the instant case.

The Court of Appeals should have abstained from construing the Massachusetts statute in these circumstances since an interpretation of the statute by the Massachusetts Supreme Judicial Court vis-a-vis the equal protection argument could well have been dispositive of the case. *Rail-*

---

[1] Calif., Penal Code Sec. 953; New York, Code of Criminal Procedure Sec. 277; Nev., Rev. Stat., Ch. 174, Sec. 105; La., Code of Criminal Procedure, T.T. 13, Ch. 2, Art. 466; Rhode Island Criminal Procedure, 12-12-2; Okla. Stat. Anno. 22 Sec. 409.3; Iowa, Code Anno. Sec. 773.8; So. Dakota, Compiled Laws, 1967 Anno., Crim. Procedure, 23-32-12, 13; Ariz. Rev. Stat. Rule 117; Idaho, Code 19-1412.

road Commission of Texas v. *Pullman Co.*, 312 U.S. 496 (1940); *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168 (1941); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Reetz* v. *Bozanick*, 397 U.S. 82 (1970). See also *Cardinale* v. *Louisiana*, 349 U.S. 437, 459 (1969), where this Court stated:

> "... in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality."

In the instant case, there is no allegation of 'facial' invalidity of Mass. General Laws, ch. 277, §19. Indeed, if there were, the Declaratory Judgment Act (Mass. General Laws ch. 231A) would provide the appropriate avenue for adjudication of the issue. Moreover, no First Amendment guarantee is involved. Similarly, unlike the situation in *Zwickler* v. *Koota*, 389 U.S. 241, (1967), the state statute under consideration here is not patently unconstitutional, nor incapable of narrow construction or limitation by the state courts.

The Court of Appeals decision clearly violates the principles underlying the abstention doctrine which were most recently reaffirmed in *Younger* v. *Harris*, —— U.S. ——, 8 Cr. L. 3103, 3105:

> "What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, *always endeavors to do so in ways that will*

not unduly intervene with the legitimate activities of the States." (Emphasis supplied)

In the instant case the courts of Massachusetts should have been granted, at the minimum, the opportunity to construe Mass. General Laws ch. 277, §19 in light of the Equal Protection Clause of the Fourteenth Amendment. Exhaustion is based on much of the same policy as abstention.

If the accepted practice is for a federal court to refrain from granting equitable relief from state criminal proceedings on the basis of the doctrine of abstention or comity necessary for a successful and harmonious functioning of the federal system, (with the exception of First Amendment cases), we suggest, there is no less a basis for a like exercise of restraint in habeas corpus proceedings in which jurisdiction to render judgment on the constitutionality of a state statute is at least questionable and should not be exercised until state remedies are exhausted.

By granting the writ of habeas corpus in the circumstances of this case the Court of Appeals has struck at

> "... perhaps the most sensitive source of friction between states and nation, namely the active intrusion of the federal courts in the administration of criminal law for the prosecution of crimes solely within the power of the states." *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951).

II. Application of Mass. Gen. Laws c. 277, Sec. 19 to the Circumstances of this Case Did Not Involve a Denial of Equal Protection in Violation of the United States Constitution.

Article XII of the Massachusetts Declaration of Rights provides in pertinent part:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; * * *

That Article has been construed by the Massachusetts Supreme Judicial Court to mean that a sentence to a state prison, or capital punishment, may not be imposed unless the criminal proceedings were originated by an indictment or presentment of a grand jury. *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329, 342-349 (1857).

Mass. Gen. Laws ch. 277, Sec. 19, which was made applicable to respondent in the state trial court, provides:

> If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of a defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsquent proceedings, with a reference to the fact that he was indicted by name or description mentioned in the indictment.

In *Commonwealth* v. *Gedzium*, 259 Mass. 453, 156 N.E.2d 890 (1927), the Massachusetts Supreme Judicial Court concluded that the provisions of this statute were fully consistent with the provisions of Article XII of the Declaration of Rights. In reaching that conclusion, the court noted in particular reference to that case (259 Mass. at 460-461):

> There is nothing in this record to warrant the inference that the grand jury, in framing the indictment, did not use all the information within its reach in de-

scribing the defendant, and did not have in mind a particular person, of whom no better description could be given than a fictitious name. The indictment cannot rightly be construed in the circumstances here disclosed as an indictment in blank, usable at will against any member of the community. Someone must be described in an indictment as charged with the commission of a crime. Commonly the name of a person is the distinctive characterization in words by which he is known and distinguished from others. (Citation omitted). Nevertheless, the grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and identifying characteristics so that no adequate description of him can be given when his definite existence as a human being is disclosed and established. A fictitious description of an actual person, when that is the best description obtainable, authorized by legislative enactment, does not violate the provisions of said art. 12.

Motion to enter upon the record the true name of the person indicted, to be used in subsequent proceedings, must be allowed by the court as it was in the case at bar. Such allowance *presupposes the finding by the court* of all the facts essential thereto to the end that no injustice be done to any defendant. (Citations omitted, emphasis supplied).

In the circumstances, application of the provisions of Mass. Gen. Laws ch. 277, Sec. 19 to respondent involved no violation of the equal protection clause of the Fourteenth Amendment. In construing that statute as consistent with the provisions of Article XII, the Massachusetts Supreme

Judicial Court concluded that the legislature directed its concern to a particular classification, to wit, a classification where the grand jury, although able to conclude that there was probable cause to believe that all of the elements of the crime were present, was unable to determine the perpetrator's name or a description which would readily admit to any degree of particularization. The court further noted that this classification was just and reasonable, lest an undue preference be accorded to the cunning, the discreet, or the disguised, whose actual description could not be reasonably particularized to any degree of certainty. Under the court's interpretation of the statutory provisions, *prompt* justice would befall the notorious and disguised alike.

This classification — when measured against this declared purpose — does no violence to the equal protection clause. The classification, of course, does not concern itself with race, color, national origin, age, sex, political leanings, financial status, or any other readily identifiable group. Thus, the cases concerning those identifiable groups are not controlling with respect to the issue under consideration here. In these circumstances, the equal protection contention must be tested by the following set of "rules," to wit (*Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)):

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

On this record, it is clear that respondent had fallen far short of sustaining his burden of showing that the statutory classification "is essentially arbitrary." Moreover, it is clear—notwithstanding the allocation of the burden of proof — that the statutory classification is in fact reasonable. As noted by the Massachusetts Supreme Judicial Court, the statute permits the grand jury to perform its solemn office in spite of the fact that the perpetrator of the crime has chosen to act in a discreet manner so as to disguise his identity and appearance. And the statute also assures that the discreet and disguised, as well as the notorious, will be brought to the book *promptly* — a very real societal interest. *Commonwealth* v. *Gedzuim*, 259 Mass. 453, 460-461.

In short, the statute does serve a legitimate societal and state interest, and is fully consistent with the equal protection clause of the Fourteenth Amendment.

III. The United States Court of Appeals Erred in Construing a State Statute Which Did Not Involve Any Federal Constitutional Elements.

The decision of the Court of Appeals involved the interpretation of a rule of state law which did not constitute a "violation of the Constitution or laws or treaties of the United States" 28 U.S.C. Sec. 2241(c) (3).

The right to indictment guaranteed by the Fifth Amend-

ment of the United States Constitution is not applicable to the states. *Hurtado* v. *California,* 110 U.S. 516 (1883); *Morford* v. *Hocker,* 394 F.2d 169 (9th Cir., 1968).

The grand jury returned an indictment against one Donald E. Landry "and John Doe, the true name and a more particular description of the said John Doe being to said jurors unknown." On August 6, 1965, respondent was arrested while in the company of the aforementioned Landry. On August 9, 1965, the prosecutor filed a motion — under the provisions of Mass. Gen. Laws, ch. 277, Sec. 19 — to amend the indictment by substituting the name of respondent in the place of "John Doe". The motion was granted over respondent's objection. There has been no question raised as to the sufficiency of the indictment with respect to the identity of other principals and accessories named therein.

Respondent was obviously indicted in accord with Massachusetts procedures. It has been consistently held that the substitution of a name is a matter of form, and not of substance, provided that the grand jury has found probable cause to conclude that the accused has committed the designated crime. *Dye* v. *Socks,* 279 F.2d 834 (6th Cir., 1960); *United States* v. *Fawcett,* 115 F.2d 764 (3rd Cir., 1940); *United States* v. *Campbell,* 235 F. Supp. 94 (E.D. Tenn., 1964). Massachusetts Law is in accord. See: *Commonwealth* v. *Binkiewicz,* 342 Mass. 740, 747-748, 749; *Commonwealth* v. *Di Stasio,* 249 Mass. 273.

Assuming that the Constitution requires, at a bare minimum, that there be probable cause to believe that the accused has committed the crime prior to bringing him to trial, there remain two further relevant considerations: (1), must the record affirmatively reflect facts which establish the existence of probable cause; and (2), to whom must the showing of probable cause be made. We discuss each consideration separately below.

1. It seems clear that evidence establishing the existence of probable cause need not, as a constitutional requisite, be affirmatively spread upon the record prior to trial. Under the usual practice, an indictment is returned with nothing more. An accused is not permitted to discover or inspect the grand jury minutes before, during, or after, trial merely to determine whether or not there was sufficient evidence to establish the existence of probable cause. *United States* v. *Eskow,* 179 F. Supp. 556 (S.D.N.Y., 1968); *United States* v. *Silverman,* 132 F. Supp. 820 (D. Conn., 1955).

2. The more troubling question concerns to whom the showing of probable cause must be made. There is no dispute that a showing of probable cause to a legally constituted grand jury is all that is constitutionally required. In our view, a grand jury is not a *constitutional* necessity. In *Hurtado* v. *California,* 110 U.S. 516 (1884), the Supreme Court of the United States held that an indictment returned by a grand jury was not a constitutional prerequisite to bringing an accused to trial for murder. Of course, in that case, the information procedure then in use in California required that a magistrate be satisfied by written depositions that there was probable cause to believe that the accused in fact committed the crime. See *Hurtado,* at 516-518, 538. That distinction, however, proved to be without constitutional relevance or significance. In *Lem Woon* v. *State of Oregon,* 229 U.S. 586 (1913), the defendant Lem Woon was tried for murder upon an information filed by the district attorney. At that time, the (*Lem Woon,* at 587):

> * * * Constitution and laws of Oregon * * * in force did not require any examination, or commitment by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath. (Citations omitted).

Lem Woon argued that his conviction was unconstitutional because he was not proceeded against by indictment. He attempted to avoid the rationale of the *Hurtado* case by arguing that, in *Hurtado,* the petitioner was entitled to a preliminary judicial examination into the issue of probable cause before he could legally be brought to trial, whereas he, Lem Woon, was not so entitled under the laws of Oregon. The Court summarily rejected this purported distinction, stating (*Lem Woon,* at 590):

> The distinction sought to be drawn between the present case and of Hurtado, on the ground that the Oregon system did not require that the information be preceded by the arrest or preliminary examination of the accused, is untenable.
>
> Although [Lem Woon] waived examination, we prefer not to rest upon the circumstance as a ground of decision. For if (as seems to be conceded) the preliminary examination had no lawful status under the laws of Oregon, it is not easy to see how his position was altered for the worse by his waiving such examination.
>
> But since, as this court has so often held, the "due process of law" clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states.
>
> The matter is so clearly settled by our previous decisions that further discussion is unnecessary.

The rationale of *Lem Woon* — i.e., that probable cause on the part of the *prosecutor* is sufficient to bring an accused to trial — was followed by the Court in *Ocampo* v. *United States,* 234 U.S. 91 (1919). To our knowledge, no court has

departed from that established principle. E.g., *Lyle* v. *Edison*, 182 F.2d 345, 346 (8th Cir., 1950); *Lewis* v. *State of Oklahoma*, 304 F. Supp. 116, 122 (W.D. Okla., 1969); *Cody* v. *Page*, 296 F. Supp. 961, 962 (W.D. Okla., 1969); *Williams* v. *Page*, 289 F. Supp. 661, 663 (E.D. Okla., 1968). It is thus clear that probable cause on the part of the *prosecutor* is sufficient to bring an accused to trial.

With reference to the above-stated principles, we submit that it is clear that respondent's conviction for murder in the first degree was fully consistent with the applicable guarantees of the United States Constitution. Moreover, the fact that the prosecutor moved that the indictment be altered to reflect respondent's true name evidences that the prosecutor had probable cause to believe that respondent committed the crime of which he was subsequently convicted. For the reasons stated above, the fact that the record does not affirmatively reflect the evidence upon which Chief Justice Tauro reached this conclusion is irrelevant. It may well be that such evidence was communicated to the Chief Justice without a stenographer present and ex parte by the investigators who also testified before the grand jury. If that was the case, then the respondent was not prejudiced, since grand jury proceedings are, by their very nature, carried on in an ex parte proceeding. At the very least the Court of Appeals should have sent the case back to the state courts for an authoritative interpretation of what Massachusetts law requires to amend a "John Doe" indictment, and if those requirements were met in this case.

Taken together, it is clear that one, if not all, of three offices — i.e., the grand jury, the prosecutor, and the Chief Justice — had probable cause to believe that respondent committed the crime of which he was subsequently convicted. The United States Constitution demands no more.

Moreover, the statute which the Court of Appeals has seen fit to interpret is one concerning state procedure and

does not involve a constitutional guarantee. The interpretation of such a statute should properly be left to the consideration and judgment of the courts of that state. *Brady* v. *State of Maryland*, 373 U.S. 83, 90 (1963); *United States ex rel Almieda* v. *Rundle*, 255 F. Supp. 936 (D.C.E.D. Pa., 1963); aff'd, 383 F.2d 421 (3rd Cir., 1967), cert. den., 393 U.S. 863 (1968).

Conclusion

The petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General
Chief, Appellate Section
CHARLES E. CHASE
Assistant Attorney General

Of Counsel:
BARBARA A. H. SMITH

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537

JAMES J. CONNOR,
PETITIONER, APPELLANT,
v.
PHILIP J. PICARD,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE AND COFFIN, *Circuit Judges*.

James J. Twohig for appellant.
Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *Garrett H. Byrne*, District Attorney, Suffolk County, were on brief, for appellee.

December 10, 1970

ALDRICH, *Chief Judge*. A Massachusetts grand jury indicted Donald Landry, three other named defendants, and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," in connection with the killing of one Robert Davis. Subsequently petitioner Connor was found in Landry's apartment and arrested. On motion presented to the Superior Court by the district attorney, the follow-in order was entered over petitioner's objection.[1] "Court

[1] We make note of the objection because we are not to be taken as intimating that a Massachusetts defendant cannot waive what we herein hold is his right to be properly indicted.

having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name of James J. Connor to be entered on the record." This procedure was authorized by a Massachusetts statute, Mass. G.L. c. 277, § 19.[2] Petitioner was arraigned on the indictment. After unsuccessful attempts by him to inspect the grand jury minutes to ascertain whether there was evidence implicating him in the killing, the case went to trial and petitioner was convicted of first degree murder. His state appeal challenging, *inter alia,* the validity of the indictment, failed. *Commonwealth* v. *Doherty,* 1967, 353 Mass. 197 (two justices dissenting). He then brought a habeas corpus petition in the district court and, when he failed there as well, this appeal followed.

Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his statute remedy, citing *Needel* v. *Scafati,* 1 Cir., 1969, 412 F.2d 761, *cert. denied* 396 U.S. 861, and *Subilosky* v. *Commonwealth,* 1 Cir., 1969, 412 F.2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel,* nor precedent, as in *Subilosky,* that were not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with "an opportunity to apply controlling legal principles to the facts bearing upon [his]

[2] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by another practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment." Mass. G.L. c. 277, § 19.

constitutional claim." *United States ex rel. Kemp* v. *Pate,* 7 Cir., 1966, 359 F.2d 749, 751; *cf. Wilbur* v. *Maine,* 1 Cir., 1970, 421 F.2d 327. That is enough to satisfy the requirements of the exhaustion of the doctrine. *Sullivan* v. *Scafati,* 1 Cir., 1970, 428 F.2d 1023, 1024 n. 1. We therefore turn to the merits.

The Commonwealth's initial brief asserts that "... properly viewed, petitioner's sole argument is no more than one that there was insufficient evidence before the grand jury showing that petitioner was Landry's accomplice. Such a claim, however, does not warrant judicial review. [Citations omitted.] There are sound policy reasons underlying the rule that an accused cannot challenge the sufficiency of the evidence before the grand jury." This misstates the issue. Petitioner is not challenging the validity of the grand jury determination. On the contrary, the grand jury itself has said that there was insufficient evidence to indict him, and we accept that as true. *See Commonwealth* v. *Gedzium,* 1927, 259 Mass. 453, 458. The question is whether, since the jury concededly did not find probable cause, petitioner has a constitutional complaint. We assume there is no general due process right to require that prosecution be preceded by an indictment. *Lem Woon* v. *Oregon,* 1913, 229 U.S. 586; *Hurtado* v. *California,* 1884, 110 U.S. 516; *see Beck* v. *Washington,* 1962, 369 U.S. 541, 545; *cf. Ocampo* v. *United States,* 1914, 234 U.S. 91. The issue is whether, in view of the extent to which Massachusetts affords this protection to others, the procedure by which petitioner was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws.

The Massachusetts court has defined the requirements of the Commonwealth's Constitution.

> "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a crim-

> inal charge until the incriminating evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends."

Commonwealth v. *Holley,* 1855, 3 Gray 458, 459 (Shaw, Ch. J.).

Because of this requirement, Massachusetts indictments are, with the possible exception of the John Doe procedure, amendable only with respect "to matters of form and not as to matters of substance." *Commonwealth* v. *Snow,* 1930, 269 Mass. 598, 606.[3] In sustaining the present statute in 1927, the Massachusetts court acknowledged that legislative authority to interfere with the protection of the grand jury system was limited to "minor details or unessential formalities." *Commonwealth* v. *Gedzium,* ante at 459. It justified the procedure by stating, without elucidation, that the addition of the defendant's name was neither an amendment nor completing an indictment "in black." Id. at 457, 461.

We are not concerned with the soundness of the conclusion that the John Doe procedure is not in conflict with the Massachusetts Declaration of Rights, but we are concerned with its consequences. There can be no doubt as to the substantiality of the loss to a defendant of the protection afforded by a requirement that there must be an indictment before he can be brought to trial. The grand jury is "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusa-

---

[3] *Compare Commonwealth* v. *Cooper*, 1928, 264 Mass. 378 (arson; words "wilfully and maliciously" cannot be added) *and Commonwealth* v. *Snow*, ante (extortion; identity of person threatened cannot be changed), *with Commonwealth* v. *DiStasio*, 1936, 294 Mass. 273 (murder; true name of victim designated as "John Doe" can be attached where indictment alleged date and place of commission of crime). *See also Commonwealth* v. *Crotty*, 1865, 10 Allen 403.

tion whether it comes from government, or be prompted by partisan passion or private enmity." *Ex parte Bain*, 1887, 121 U.S. 1, 11. Nor can we doubt that petitioner was denied that protection. Entering a defendant's name on the record could be termed a matter of form only if the grand jury had already sufficiently described him so that adding the true name was, in fact, only a formal matter.[4] Absent such identification, the court's assertion in *Gedzium* that there was no reason to suppose that the grand jury "did not have in mind a particular person," 259 Mass. at 460, might, with due respect, be termed sophistical. Of course the jury had in mind a particular person, viz., the person who committed the crime. It had nothing in mind, however, to indicate the criminality, to use the court's word in *Holley*, of the petitioner. We must agree with the view of the dissenting justices in petitioner's case. *See* 353 Mass. at 216-18. Petitioner faced trial not as the result of a determination of his criminality by the grand jury, but because, relying on the special statutory procedure, the jury delegated this decision to others.[5]

We come, then, to the question: whether there is adequate justification for the difference in treatment Massachusetts accords defendants like petitioner and those who are brought to trial on regular indictments. If the difference

---

[4] In *Commonwealth* v. *Crotty*, 1865, 10 Allen 403, the Massachusetts court suggested that if the document—there a warrant—although using a fictitious name, described the defendant's "occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified," it might be "sufficient to indicate clearly" who was intended. Id. at 405.

[5] We may observe that under the Massachusetts John Doe practice not only is it never established that any newly discovered evidence relied upon by the prosecuting attorney in naming a defendant would have been sufficient to persuade the grand jury, there appears to be no obligation on his part to produce any new evidence at all. So far as the statute provides, he is apparently at liberty merely to conclude that the grand jury was over-cautious in rejecting what he originally presented.

is to withstand constitutional scrutiny it must be based upon classifications which, at a minimum, are rationally related to a permissible state purpose. *See, e.g., Walters* v. *City of St. Louis,* 1954, 347 U.S. 231; *Skinner* v. *Oklahoma ex rel. Williamson,* 1942, 316 U.S. 535; *Lindsley* v. *Natural Carbonic Gas Co.,* 1911, 220 U.S. 61. The Commonwealth has suggested only one justification for its procedure. The court in *Gedzium* said, at 461:

> "[T]he grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and his identifying characteristics so that no adequate description of him can be given when his definite existence as a human being is disclosed and established."

Having in mind that in *Gedzium,* as here, there was no indication that the actor had used any form of disguise, the court's rhetoric is merely a euphemism for the absence of evidence. A more frank, though obviously less palatable, statement of its position would be that while, where the actor is known to the grand jury, he cannot be charged unless it finds the evidence against him sufficient; if he is not known because, like criminals generally, he has neglected to reveal his identity, this relieves the Commonwealth of the necessity of obtaining any grand jury finding of cause.

As a basis for classification, the *Gedzium* rationale is not even minimally persuasive. Even if it should appear that the action made a deliberate attempt to "hamper" the grand jury, to say that conduct on his part justifies the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant bridges the very question at issue. One might equally say

that a robbery defendant should not be allowed to assert inability to afford counsel in view of all the money he stole.

We see no end served by the statute except prosecutorial convenience. However, the Commonwealth properly does not argue that the mere fact that, for no definable reason — whether deliberate, fortuitous, or inadvertent — it sought an indictment before it had sufficient basis for one, should relieve it of the necessity of returning to the grand jury when it had a better case. As a ground for distinguishing between defendants, this is clearly inadequate. *See* Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065, 1081 (1969).

With all deference, the Massachusetts court has approved a procedure similar to the one it condemned in *Commonwealth* v. *Crotty,* n. 4 ante, as comparable to the detested pre-Revolutionary general warrant. It is no better merely because the delegation was made by a grand jury rather than by a magistrate. In the light of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination.

The judgment of the district court dismissing the petition is vacated. The case is remanded with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537.

JAMES J. CONNOR,
PETITIONER, APPELLANT,
v.
PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT, APPELLEE.

JUDGMENT
Entered: December 10, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth. No costs.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: Messrs. Twohig and Quinn.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil
No. 68-88-G

JAMES J. CONNOR,
PETITIONER,
v.
PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

OPINION
January 16, 1970

GARRITY, J. Petitioner for haveas corpus, Connor, and a codefendant Lendry were found guilty on March 25, 1966 of murder in the first degree of Davis. The crime was committed on May 1, 1965. The jury recommended that the death penalty not be imposed and petitioner is serving a life sentence. Codefendants named Doherty were found guilty of being accessories. Petitioner's conviction was affirmed on appeal, *Commonwealth* v. *Doherty,* 353 Mass. 197, decided August 22, 1967.

The petition for habeas corpus asserts seven numbered grounds for relief, but without specifying in some instances the federal constitutional right relied upon and the exhaustion of avilable state remedies regarding the particular claim. Accordingly, the court entered an order limiting the hearing to reasons (1) and (3) unless the petitioner should file prehearing statements showing his exhaustion of state remedies with respect to certain grounds and the federal constitutional nature of others. No such statements were received from petitioner previous to the

hearing, but at the hearing on the petition for the writ, on motion of the petitioner, leave was granted to include such statements in a brief to be submitted after the hearing. The effect of the court's limiting order, as modified by allowance of the petitioner's motion at the hearing, has been to exclude from the court's consideration three of the seven grounds asserted in the petition, numbers (2), (4) and (5).[1] At the hearing in this court, the petitioner was represented by the same attorney who represented him at the trial and in the Supreme Judicial Court on appeal.

Findings of Fact

The evidence at the trial was to the effect that shortly before 3:00 A.M. on May 1, 1965 petitioner and Landry came to the third floor apartment in Boston in which Davis was killed in response to urgent telephone calls from the Dohertys that Davis was threatening them and their children with two revolvers. Before Connor and Landry arrived, Davis had fallen asleep on a couch in the den and had been disarmed by Mr. Doherty. When they arrived at the house, Connor and Landry rushed up the stairs and Mrs. Doherty pointed to the sleeping or dozing Davis as the one who had been threatening her family. Landry put a shotgun in Davis's belly and said, "Hey, hey" twice and, as Davis was awakening, shot him in the belly. Landry and Connor picked Davis up, one under each arm, dragged him to the doorway and let him drop down the stairs. Davis was left sprawled out on the front porch, dead.

Two witnesses identified petitioner as having accompanied Landry. One of them, Betty Moore, was a boarder occupying a room in the Doherty apartment and the other

[1] One of the excluded grounds, number (4), was nevertheless briefed by the petitioner and has been considered by the court. It claims prejudice from denial of petitioner's motion for severance because a bill of particulars filed in the case against one of the co-defendants contained an allegedly inflammatory description of the killing. This ground is obviously without merit.

was her friend, Ronald Hayes. Codefendant Mrs. Doherty testified that petitioner was not at her house on the night of the crime: Connor did not testify, but took advantage of the now unique Massachusetts practice, see *United States* v. *Cartano, etc.*, No. 7325, 1 Cir., Jan. 12, 1970, of making an unsworn statement to the jury in which he said he was not on the premises on the night of the crime.

The grand jury received evidence in June 1965 but took no action. It received further evidence in August and returned an indictment on August 4, 1965 charging Landry "and John Doe . . ." with the murder. On August 9 the Commonwealth filed a motion to amend the indictment by substituting petitioner's name for John Doe and the motion was allowed after a hearing at which no evidence was introduced.

During the period of approximately seven months between the indictment and the trial, defendants endeavored without success to interview Betty Moore, who was held in protective custody by the prosecution. Petitioner also sought to obtain a copy of her testimony before the grand jury in support of his motion to quash and dismiss the indictment on the ground that no evidence before the grand jury indicated that he was the "John Doe" intended to be arrested.

At the trial petitioner and other defendants unsucessfully sought disclosure by the prosecution of Moore's grand jury testimony, after she had admitted on cross-examination that she had testified falsely before the grand jury in June 1965. She testified that she had committed perjury before the grand jury in June because of threats by a relative of the Dohertys and that she told the truth to the grand jury in August. When the defendants, including the petitioner, moved that the prosecution be required to furnish the defense with a transcript of Moore's testimony before the June grand jury, the trial judge denied the mo-

tion explaining that the method which should be pursued by the defendants was to get the stenographer who had transcribed the grand jury minutes. The judge suggested that the prosecution attorney find out during recess the name of the stenographer and let defense counsel know so that they might bring the stenographer to the trial. So far as appears, none of the attorneys took any action in line with the court's suggestion. During further cross-examination, the defense attorneys elicited repeated admissions from witness Moore that she had committed perjury before the grand jury in June. The contents of Moore's grand jury testimony were undisclosed in the state courts and not offered in evidence in this court.

Conclusions of Law

The only substantial issue presented by the petitioner is the first part of ground (3) relating to petitioner's failure to obtain a copy of Betty Moore's testimony before the June grand jury. We shall therefore first discuss summarily grounds (1), (6) and (7) and the second part of ground (3). Ground (1) is that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment of the Constitution of the United States.[2] But it is well settled that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment. *Hurtado* v. *California,* 1884, 110 U.S. 516, *Beck* v. *Washington,* 1962, 369 U.S. 541, 545. The second part of ground (3) is that petitioner's counsel was denied the opportunity of interviewing material witnesses

[2] In support of this and all other grounds for relief, petitioner has argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds. No effort has been made in the petition or in petitioner's brief to particularize the federal rights allegedly violated in the state courts apart from general references to various provisions of the federal Bill of Rights and the Fourteenth Amendment.

in the same manner as the prosecution, to which they were constantly available. Apart from its having scant support in the record and petitioner's reliance in this regard upon the Massachusetts Declaration of Rights, petitioner failed to object to the rulings of the judges of the Superior Court when the matter was brought before them in pretrial hearings and did not claim error on this score in the Supreme Judicial Court. He has probably waived this ground. In any event, he has not exhausted available state court remedies.[3] Ground (6) is that the trial court erred in excluding a certain line of questioning on crossexamination of witness Moore designed to test her credibility. Despite this court's orders before and at hearing, petitioner's brief does not attempt to show the involvement of a federal constitutional right in this contention apart from the general statement that trial procedures must be fundamentally fair. If there was error, it does not approach constitutional dimensions. Ground (7) is likewise illusory. It alleges an error in the case against codefendants Doherty, which the petition asserts was prejudicial to petitioner because severance was not ordered. Despite this court's orders, petitioner has made no attempt to demonstrate an exhaustion of avilable state court remedies with respect to this ground. 28 U.S.C. § 2254. Furthermore, this ground was virtually abandoned in petitioner's brief in this court, which devotes but a single sentence to the point, including a surprising disclaimer of prejudice to the petitioner.

The issue with respect to petitioner not having received a transcript of Betty Moore's testimony before the June 1965 grand jury, denominated the first part of ground (3), was preserved at the trial and argued on appeal. It has

---

[3] Codefendants did preserve a similar point on appeal, without success. However, this does not excuse petitioner from seeking relief in the state courts because this ground involves a consideration of facts and circumstances of the case as they relate to a particular defendant.

not been disputed by the Commonwealth that the petitioner demonstrated a "particularized need", *Pittsburgh Plate Glass Co. v. United States*, 1959, 360 U.S. 395, 400, for disclosure of Betty Moore's grand jury testimony inasmuch as she admitted perjury before the June grand jury. Regarding defense counsel's demand at the trial that the transcript be made available to them for purposes of further crossexamination, it should be noted first that the *Pittsburgh Plate Glass Co.*, case did not decide whether such a procedure should be followed or whether the trial judge should examine the transcript *in camera* to ascertain the nature of the inconsistencies between the witness's testimony at trial and previously. *Dennis* v. *United States* 1966, 384 U.S. 855, 875, holding that the determination of what may be useful to a defendant can properly and effectively be made only by an advocate, was not decided until June 20, 1966, approximately three months after the completion of petitioner's trial. However, in *Commonwealth* v. *Ladetto*, 1965, 349 Mass. 237, 244-245, the Supreme Judicial Court anticipated the holding in *Dennis* and, on petitioner's appeal, applied the *Dennis* principle in deciding the discovery question against him, two justices dissenting. The Supreme Judicial Court held that the trial judge did not deprive the petitioner of access to the minutes of the June grand jury and that counsel's failure to pursue the course indicated by the trial judge, of procuring the attendance of the grand jury stenographer, was responsible for any prejudice to him.

In this court both parties have argued the question of the proper application of the *Dennis* rule without alluding to the necessary consideration whether it applies to criminal trials in state courts under the due process clause of the Fourteenth Amendment. It seems clear that it does not, because not "fundamental" nor "necessary to an Anglo-American regime of ordered liberty." See *Duncan* v. *Louisiana*, 1968, 391 U.S. 145, 149-50 n. 14. The Supreme

Court based it decision in *Dennis* upon its supervisory powers over federal district courts and not upon a constitutional right of the accused. *Broeckel* v. *Green,* N.D. Ohio 1967, 298 F.Supp. 249, 253. Discovery rights such as inspection of grand jury minutes are not of constitutional origin and they represent exceptions to the general rule concerning discovery in criminal cases, *Corbett* v. *Patterson,* D. Colo. 1967, 272 F.Supp. 602, 609. There has been no hint in Supreme Court cases that this procedure of disclosing grand jury minutes was thought to be compelled by the due process clause of the Fifth Amendment. *United States* v. *Lavallee,* 2 Cir. 1965, 344 F.2d 313, 315. Nor has there been any suggestion that the rule of the *Dennis* case should be applied retroactively.

Therefore any error by the courts of Massachusetts in deciding whether petitioner was entitled at trial to disclosure of witness Moore's grand jury testimony, at least as asserted by petitioner in the Supreme Judicial Court and in this court,[2] involved the interpretation of a rule of state law and not a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). With respect to the scope of federal habeas corpus jurisdiction, the identity of the state and federal discovery rules is immaterial.

Accordingly it is ordered that the petition be denied and the case dismissed.

(s) W. Arthur Garrity, Jr.
United States District Judge

---

[4] In *United States* v. *Lavallee, supra,* at 315, it is stated, "It could be argued with some force that when the Grand Jury testimony is exculpatory and the trial testimony inculpatory . . . failure to make the Grand Jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense. *Brady* v. *Maryland,* 373 U.S. 83 [and other cases]." We intimate no opinion on any such contention in this case. Suffice it to note that the point has never been raised by petitioner in the Massachusetts courts. See *Lamoureux* v. *Comm. of Mass.,* 1 Cir. 1969, 412 F.2d 710, 711.

LIBRARY
U. S

Supreme Court, U.S.
FILED
JUL 31 1971
E. ROBERT SEAVER, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1970

70-96

No. 70-96

PHILIP J. PICARD,
PETITIONER,

v.

JAMES J. CONNOR,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General
Chief, Appellate Section
Criminal Division

GARRETT H. BYRNE
District Attorney

CHARLES E. CHASE
Assistant Attorney General

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision	3
Statutes Involved	3
Statement	
A. The Court Proceedings	4
B. The Facts of The Crime	5
Summary of Argument	10
Argument	
I. A Charging Procedure Which Satisfies State Law and Does Not Violate Any Federally Protected Right Does Not Present an Issue Cognizable in Habeas Corpus Proceedings	12
A. The State Indictment Under Which Respondent Was Tried Was A Valid Indictment Under the Laws of the Commonwealth of Massachusetts	13
II. The Court of Appeals Erred in Not Remanding The Case to The State Court Because the Respondent Had Never Presented the Equal Protection Argument to The State Court	16
III. The John Doe Procedure Does Not Violate the Equal Protection Clause of the Fourteenth Amendment	21
A. A Statute Which Requires A Judicial Finding Of Cause Before Entering A Name Is Not Arbitrary	22
B. The Manner of Amending The Indictment To Include The Name Of The Res-	

Page

pondent Was Constitutionally Permissible and Violated No Federal Constitutional Rights 27

C. The Statute Serves Valid State Purposes 31

Conclusion 44

Table of Citations

Cases

Ah Sin v. *Wittman,* 198 U.S. 500 (1905) 42

Beal v. *Missouri Pacific R. Co.,* 312 U.S. 45 (1941) 16

Beck v. *Washington,* 369 U.S. 541 (1962) 12, 43, 44

Bergemann v. *Backer,* 157 U.S. 655 (1895) 14

Bowen v. *Johnson,* 306 U.S. 19 (1939) 17

Brady v. *Maryland,* 373 U.S. 83 (1963) 15

Brown v. *Commonwealth,* 335 Mass. 476 18

Buck v. *Bell,* 274 U.S. 200 20

Cappetta v. *Wainwright,* 433 F.2d 1027, 1030 (5th Cir. 1970) 15

Case v. *Nebraska,* 381 U.S. 336 (1965) 17

Chow Bing Kew v. *U.S.,* 248 F.2d 466 (9th Cir. 1957) cert. den., 355 U.S. 889 (1957) 29

Commonwealth v. *Baldassini,* Mass. Ad. Sh. (1970) 989 ..... 14, 25

Commonwealth v. *Baron,* 356 Mass. 362, 364 Mass. Adv. Sh. (1969) 1233 23

Commonwealth v. *Bracy,* 313 Mass. 121 (1943) 25

Commonwealth v. *Capland,* 254 Mass. 556 (1926) 14, 24

Commonwealth v. *Cooper,* 264 Mass. 378 (1928) 25, 26

Commonwealth v. *Crotty,* 92 Mass. (10 Allen) 403 25

Commonwealth v. *Doherty,* 353 Mass. 197 cert. den. 390 U.S. 982 (1968) 5, 14, 25

Page

Commonwealth v. *Freelove*, 150 Mass. 66 (1889) ... 32
Commonwealth v. *Galvin*, 323 Mass. 205 ... 23
Commonwealth v. *Geagan*, 339 Mass. 487 (1959) cert. den. *sub nom. Geagan, et al.* v. *Massachusetts*, 361 U.S. 895 (1959) ... 22
Commonwealth v. *Gedzium*, 259 Mass. 453 (1927) ... 14, 24, 26, 27, 28, 33, 34, 36, 40, 41, 43
Commonwealth v. *Gorman*, 288 Mass. 294 (1934) ... 14
Commonwealth v. *Jordan*, 207 Mass. 259 (1911) *aff'md sub nom. Jordan* v. *Massachusetts*, 225 U.S. 167 (1912) ... 26
Commonwealth v. *Knapp*, 26 Mass. (9 Pick) 495 ... 23
Commonwealth v. *Lammi*, 310 Mass. 159 ... 23
Commonwealth v. *McNary*, 246 Mass. 46 (1923) ... 23, 24, 35
Commonwealth v. *Miller*, 297 Mass. 285 (1937) ... 14
Commonwealth v. *Smyth*, 65 Mass. (11 Cush.) 473 (1853) ... 13, 22
Commonwealth v. *Snow*, 269 Mass. 598 (1930) ... 27
Commonwealth v. *Tay*, 170 Mass. 192 (1898) ... 14
Commonwealth v. *Ventura*, 294 Mass. 113 ... 23
Commonwealth v. *Walsh*, 255 Mass. 317 ... 23
Commonwealth v. *Woodward*, 157 Mass. 516 (1893) ... 22, 23
Connor v. *Picard*, 308 F. Supp. 843 (1970) ... 5, 19, 20, 24, 26, 29, 38
Coolidge v. *New Hampshire*, —— U.S. —— (slip opinion 5, 6) ... 25
Costello v. *United States*, 350 U.S. 359 (1956) ... 23
Corfellesso v. *Commonwealth*, 354 Mass. 514 (1968) ... 18
Dominion Hotel, Inc. v. *Arizona*, 249 U.S. 265 ... 41
Douglas v. *City of Jeannette*, 319 U.S. 157 (1943) ... 16
Dye v. *Sacks*, 279 F.2d 834 (6th Cir. 1960) ... 27
Earl v. *Commonwealth*, 356 Mass. 181, (1969) ... 17
Edelman v. *California*, 344 U.S. 357 (1918) ... 38
Ex Parte Hawk, 321 U.S. 114 (1944) ... 17

Page

Fine v. *Commonwealth*, 312 Mass. 252 (1942) 34
Fogg v. *First National Bank of Boston*, 268 Mass. 25 (1929) 24
Frisbie v. *Collins*, 342 U.S. 519 (1952) 14
Fulwood v. *Stone*, 394 F.2d 939 (D.C. Cir. 1967) 17
Gaines v. *Washington*, 277 U.S. 81 (1928) 12
Gilbert v. *California*, 388 U.S. 263 (1967) (353 Mass. 202) 13
Graham v. *West Virginia*, 224 U.S. 616 (1912) 40
Grand Jurors for Worcester County v. *The Commissioners of Corporations and Taxation*, 329 Mass. 89 (1952) 22, 23
Gray v. *Swenson*, 430 F.2d 9 (8th Cir. 1970) 15
Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U.S. 412 41
Heard v. *Pierce*, 62 Mass. 8 (Cush.) 338 (1851) 22
Henderson v. *Cardwell*, 426 F.2d 150 (6th Cir. 1970) 15
Hurtado v. *People of State of California*, 110 U.S. 516 (1884) 12, 19, 32, 37
Johnson v. *Beto*, 383 F.2d 197 (5th Cir. 1967) 15
Johnson v. *Turner*, 429 F.2d 1152 (10th Cir. 1970) 15
Johnson v. *United States*, 333 U.S. 110 ..... 11, 25
Jones v. *Robbins*, 74 Mass. (8 Gray) 329 (1857) 19, 32
Ker v. *Illinois*, 119 U.S. 436 (1886) 14
Knewel v. *Egan*, 268 U.S. 442 (1925) 10, 14
Lee Gim Bor v. *Ferrari*, 55 F.2d 86 (1st Cir. 1932) 29
Lem Woon v. *Oregon*, 229 U.S. 585 (1913) 43
Letters v. *Commonwealth*, 346 Mass. 403 18
Lindsley v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911) 39, 40
Mahon v. *Justice*, 127 U.S. 700 (1888) 14
Malloy v. *Hogan*, 378 U.S. 1 (1964) 12
Mancusi v. *De Forte*, 392 U.S. 364 (1968) 25

Page

Michaud v. *Robbins*, 424 F.2d 971 (1st Cir. 1970) ... 21
Mintzer v. *Dros*, 403 F.2d 42 (2nd Cir. 1967) *cert. den.* 390 U.S. 1044 ... 15
Miranda v. *Arizona*, 384 U.S. 436 (1966) ... 13
Morford v. *Hocker*, 394 F.2d 169 (9th Cir. 1968) *cert. den.* 392 U.S. 944 ... 15
Murphy v. *Beto*, 416 F.2d 98 (5th Cir. 1969) ... 15
New York Rapid Transit Corp. v. *City of New York*, 303 U.S. 573 ... 41
Ocampo v. *United States*, 234 U.S. 91 (1914) ... 43
O'Connor v. *Ohio*, 385 U.S. 92 (1966) ... 31
Paterno v. *Lyons*, 334 U.S. 314 (1948) ... 15
People v. *Erving*, 189 Cal. App. 2d 283, 11 Cal. Reptr. 203 (1961) *cert. den.* 368 U.S. 960 (1962) ... 28
Rose v. *Dickson*, 327 F.2d 27 (9th Cir. 1964) ... 18
Russell v. *United States*, 369 U.S. 749 (1962) ... 26, 27
Sandrelli v. *Commonwealth*, 342 Mass. 129 ... 18
Shoppers' World, Inc. v. *Board of Assessors of Framingham*, 348 Mass. 366 (1965) ... 18
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) ... 36, 37, 39, 40
Snowden v. *Hughes*, 321 U.S. 1 (1944) ... 21
Stirone v. *United States*, 361 U.S. 212 (1960) ... 25
Sullivan v. *Scafati*, 1 Cir., 1970, 428 F.2d 1023 ... 19
Sunday Lake Iron Company v. *Wakefield*, 247 U.S. 350 (1918) ... 38
Terminiello v. *Chicago*, 337 U.S.1 (1948) ... 21, 31
Townsend v. *Sain*, 372 U.S. 293 ... 12, 20
Turns v. *Commonwealth*, 47 Mass. 6 Met. 224 (1843) 13
United States v. *Campbell*, 235 F. Supp. 94 (E.D. Tenn. 1964) ... 27, 29
United States v. *Doe*, 127 F. 982 (1904) ... 30
United States ex rel. Almeida v. *Rundle*, 255 F. Supp. 936 (D.C.E.D. Pa., 1963) *aff'd* 383 F.2d 421 (3rd Cir. 1967) *cert. den.*, 393 U.S. 863 (1968) ... 15

Page

United States ex rel. Kemp v. *Pate*, 7 Cir. 1966, 359 F.2d 749 19

United States ex rel. Morrison v. *Foster*, 1949 175 F.2d 495, *cert. den. sub nom. Morrison* v. *Foster*, 330 U.S. 831 (1946) 31

United States v. *Fawcet*, 115 F.2d 764 (3rd Cir. 1940) 11, 27, 28

United States v. *Follette*, 275 F. Supp. 548 (S.D.N.Y. 1967) 17

United States v. *Skeen*, 126 F. Supp. 14 (W.D. West Virginia, 1954) 29

United States v. *Wade*, 388 U.S. 218 (1967) 13

Via v. *Perini*, 415 F.2d 1052 (6th Cir. 1969) 15

Walters v. *City of St. Louis*, 347 U.S. 231 (1957) 40, 41, 43

Wilbur v. *Maine*, 1 Cir., 1970, 421 F.2d 1327 19

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 36, 37, 38, 39, 42, 43

Younger v. *Harris*, 1971 —— U.S. —— 16

Statutes

28 U.S.C. 1254(1) 2

28 U.S.C. 2254(b) 2, 3, 10, 16, 17, 21

Mass. Gen. Laws (Ter .Ed.)

c. 212 § 14A 34

c. 250 17

c. 277 § 1 34

c. 277 § 2 33

c. 277 § 2B 34

c. 277 § 17 33

c. 277 § 18 33

c. 277 § 19 ..... 2, 3, 4, 10, 22, 33

Page

c. 277 § 20 ... 33
c. 277 § 21 ... 33
c. 277 § 22 ... 33
c. 277 § 24 ... 33
c. 277 § 25 ... 33
c. 277 § 26 ... 33
c. 277 § 27 ... 33
c. 277 § 28 ... 33
c. 277 § 29 ... 33
c. 277 § 31 ... 33
c. 277 § 32 ... 33
c. 277 § 34 ... 33
c. 277 § 36 ... 33
c. 277 § 37 ... 33
c. 277 § 41 ... 33
c. 278 § 29 ... 17
c. 278, §§ 33A-33H ... 43
c. 409 § 8 ... 33
St. 1895, c. 429 § 6 ... 33
Act of June 25, 1948 ch. 646 § 2254, 62 Stat. 967 ... 16
Acts of 1899 Chap. 409 Sec. 8 ... 33, 34
Resolve, Chapter 85, Massachusetts Acts and Resolves, 1897 ... 33
Arizona Revised Statutes Ann. — Rules of Criminal Procedure, Rule 117 ... 28
Deering's California Codes — Penal Code § 953 ... 28
Idaho Code — Gen. Laws of Idaho Anno., § 19-1412 ... 28
Iowa Code Anno. — § 773.8 (formerly § 773.7 of Code 1962) ... 28
Michigan Compiled Laws Anno. § 767.49 ... 28
Minnesota Statutes Anno., § 628.13 ... 28
Mississippi Code 1942 Anno. § 2452 ... 28
Nevada Revised Statutes, Chap. 173, sec. 105 ... 28
New Mexico Statutes Anno., Chap. 41-6-10 ... 28, 29

Page

Consolidated Laws of New York Anno., Code of Criminal Procedure, sec. 277 (repealed as of Sept. 1, 1971) 29, 30

North Dakota Century Code, Chap. 29-11-14 29

Oklahoma Statutes Anno., 22 § 409.3 29

Oregon Revised Statutes 132.540(c) 29

General Laws of Rhode Island, 12-12-2 29

South Dakota Compiled Laws Anno., 23-32-12 29

Tennessee Code Anno., 40-1803 29

Texas — Vernon's Annotated Code of Criminal Procedure, Art. 26.10 29

Revised Code of Washington, 10.46.060 29

West's Louisiana Statutes Anno. — Code of Criminal Procedure, Art. 466 28

Constitutional Provisions

United States Constitution

Amendment XIV 3, 12, 21

Amendment V 12

Massachusetts Constitution

Declaration of Rights Article 12 14

Miscellaneous

14 ALR 3d 1358 28

Comment, The Right To Nondiscriminatory Enforcement Of State Penal Laws, Columb. L. Rev. 1103 (1961) 39

Developments in the Law — Equal Protection, 82 Harvard Law Review 1120 (1969) 37

Documents, The Senate Commonwealth of Massachusetts, 1899 34

Page

The Grand Jury System In Massachusetts, A Survey, Vol. II, Suffolk University Law Review, 201 32

Grinnell, Grand Juries, The Meaning of the Phases "The Law of the Land" and "Due Process of Law," And The Extent Of the Constitutional Powers of the Massachusetts Legislature To Classify Offenses and Regulate Criminal Procedure, 6 Mass. L.Q. (No. 5) 214 (1921) 32

Mass. Adv. Sh. (1969) 963 17

Survey of the Grand Jury System, 3 Portia Law Journal 70 32

Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949) 31

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-96

PHILIP J. PICARD,
PETITIONER,

v.

JAMES J. CONNOR,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the court of appeals is reported at 434 F.2d 673. (A. 4) The opinion of the district court is reported at 308 F. Supp. 843. (A. 50) The opinion of the Supreme Judicial Court of Massachusetts is reported at 353 Mass. 197. (A. 112)

Jurisdiction

The judgment of the court of appeals was entered on December 10, 1970. The petition for a writ of certiorari was filed on March 10, 1971 and was granted on May 3, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Is habeas corpus available to test the validity of an indictment valid under state law and obtained under a procedure which is valid under state law?

2A. Should the Court below have remanded Connor to his state court remedies in view of the fact that the Supreme Judicial Court of Massachusetts had never been given any opportunity to construe this Massachusetts statute in light of federal constitutional challenge and in view of the requirements of 28 U.S.C. 2254(b)?

B. Did the Court of Appeals impermissibly enlarge the scope of review on habeas corpus to that of an appellate tribunal supervising the administration of criminal law in a state by deciding an issue on a ground not presented to the state court, not set forth in the petition for habeas corpus as a ground for relief and not decided by the federal district court?

3. Was it proper for the court below to find that the application of Massachusetts General Laws (Ter. Ed.) c. 277, §19 violated the Equal Protection Clause, since the statute is fair on its face and there was no evidence on the record that the statute was being unfairly applied or that the respondent was singled out for different treatment or that the alternate procedure was "wholly arbitrary"?

Constitutional Provision

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

Title 28, United States Code, Section 2254(b), which provides:

> "An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Massachusetts General Laws Chapter 277 §19:

> §19. *Name of accused person; description by fictitious name; entry of true name.* If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement;

but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

Statement

A. The Court Proceedings

On August 4, 1965, the Suffolk County Grand Jury returned an indictment for murder in the first degree against Donald E. Landry otherwise known as Emo Landry and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown" (A. 71). Shortly after the return of the indictment, petitioner was arrested (A. 75).

On August 9, 1965, the prosecutor filed a motion—under the provisions of Massachusetts Gen. Laws c. 277 §19—to amend the indictment by substituting the name of the respondent in place of "John Doe" (A. 73). The respondent objected (A. 78). The motion was allowed by the Chief Justice of the Commonwealth of Massachusetts (A. 59, 73).

On August 10, 1965, the docket entry of August 9 was "corrected so as to read as follows: Commonwealth files motion to amend indictment Court (Tauro, C.J.) having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name." (R. 59).

On September 10, 1965, the respondent filed motions to quash and to dismiss the indictment (A. 61, 86, 88).

On August 24, 1965 and on September 15, 1965 the respondents contentions with regard to the "John Doe" indictments were brought to the attention of the Chief Justice

(in connection with other motions not now before this Court) and of another judge of the Superior Court of the Commonwealth of Massachusetts (A. 60, 61, 90).

On September 24, 1965 after an untranscribed hearing, the superior court judge denied the motions and Connor's exceptions were saved (A. 62).

The case was tried in March of 1966 and the respondent was found guilty of murder in the first degree with a recommendation by the jury that the death penalty be not imposed (See, e.g., Gen. Laws, c. 265 §2).

The case was appealed to the Supreme Judicial Court of the Commonwealth of Massachusetts. A conviction was affirmed by that court on August 22, 1967. *Commonwealth* v. *Doherty,* 353 Mass. 197. (A. 112). A petition for certiorari was denied by this Court on March 11, 1968, 390 U.S. 982. (O.T. 1967).

On or about December 18, 1968, the respondent filed a petition for a writ of habeas corpus in the United States District Court, District of Massachusetts (A. 17). The district court held a hearing and later the district court issued its opinion. See *Connor* v. *Picard,* 308 F. Supp. 843 (January 16, 1970). A certificate of probable cause issued in January, 1970. On May 28, 1970, James Connor filed an appeal from the decision of the United States District Court in the Court of Appeals (A. 13).

Arguments were heard in the Court of Appeals on September 11, 1970 (A. 2). The Court of Appeals rendered its judgment on December 10, 1970 (A. 2). On March 10, 1970, a petition for certiorari was filed in this court (A. 3). On May 3, 1971 this Court granted the petition.

B. The Facts of the Crime

The sufficiency of the Commonwealth's evidence was not challenged in the trial court, the Supreme Judicial Court,

the district court or the Court of Appeals. It showed, as reported by the Supreme Judicial Court that on Friday evening, April 30, 1965, one Miss Elizabeth Moore and Ronald Hayes drank beer in the company of the co-defendants William Doherty and his wife, Janice Doherty, at the Sportsman's Cafe in Dorchester. Later, she, Hayes, the Dohertys, Davis (the deceased), and his friend Ronald Edwards gathered at the Doherty apartment. The company of six had supper in the kitchen. Beer was served. Doherty and Davis left the kitchen and went into the den. Upon their reappearance, Hayes saw that David had a gun in his belt. Edwards then left on Davis' crytic instruction to "Go get the queen," and "Go pick up the payroll" (according to Mrs. Doherty's testimony, "payload" or "payroll"). (353 Mass. 200-201) (A. 112, 113).

Hayes and Moore went to the latter's room, and while there heard noise and commotion. Moore opened the door and saw Mrs. Doherty making a telephone call. Davis and Doherty had returned to the den. On his wife's summons, Doherty again came out of the den and continued the telephone conversation which was not overheard. Doherty returned to the den. Mrs. Doherty then took the telephone to Moore's room, made a call, asked for "Emo," and, while waiting, told Hayes and Moore that Davis had two guns at Doherty's head and that she had to get someone to help him. She repeated this statement on the telephone. Doherty then entered the room again and said to his wife, "Janice, tell her this guy is Bobby Davis who's against me, if something happens before they get up, and tell him to bring his piece and get up here." Mrs. Doherty said, "[B]ring your piece." Upon completion of the call the Dohertys left the room. (353 Mass. at 201) (A. 113).

Approximately five minutes later Mrs. Doherty returned, made another telephone call and said, "Hello, Emo, what's

taking you so long? Why aren't you up here? He's going to kill Billy [Doherty]. Will you please come up? Take a cab, Emo. We're at 116 Dakota Street." Mrs. Doherty asked Moore for the cab money and told Moore and Hayes that they had better leave. "There's going to be trouble. . . . Emo is coming up, and he has a big gun. . . . [H]e knows how to use it . . . [I]f you want to leave, go ahead. Get out of here." Moore and Hayes declined to leave. (353 Mass. at 201) (A. 113, 114).

Moore went downstairs to meet the cab. While there she saw Edwards returning in Edward's car with another man, Adrian Delaney. Edwards drove away, Delaney remained on the porch with Moore, who then saw a cab come up Dakota Street and stop at a side street. Two people got out of the cab and went into some nearby bushes. One of them was carrying a "violin case." The jury, from later testimony, could have inferred that these two were Landry and Connor.[1] (353 Mass. at 201-202) (A. 114).

Delaney pointed a gun at Moore, calling her "Mrs. Doherty." Doherty appeared on the porch from upstairs with a gun "in his waist". Doherty told Moore to get out of there. A fight between Doherty and Delaney followed. Moore ran off the porch along the side of the house to the garage. While there, she heard a shot. Delaney ran past her down Iowa Street. She heard another shot from upstairs. Then she saw "Jimmy Conner" carrying a long case. Moore had previously met Connor through Mrs. Doherty's parents, the Bakers, who lived in the same house as

---

[1] The co-defendant, Donald Landry, was also convicted of murder in the first degree, while one other co-defendant, Janice Doherty, was convicted as accessory after the fact. The Supreme Judicial Court ordered a directed verdict of not guilty as to one co-defendant, William R. Doherty on one indictment charging him as an accessory before the fact to murder (353 Mass. at 204). (A. 117). He was, however, convicted of being an accessory after the fact to the murder (353 Mass. at 205) (A. 117).

the Dohertys on the second floor. Moore asked Connor what she should do. He answered "Just stay there and be quiet." Moore saw Hayes run from the house, get in his car and leave. On her return to the house from the garage, Moore saw Davis lying on the front porch. (353 Mass. at 202) (A. 114).

Hayes' testimony of events in the Doherty apartment from the time of his arrival to the time Moore went downstairs to meet the cab was, in most particulars, corroborative of Moore's testimony. While Mrs. Doherty was making the telephone call to Emo, Doherty told his wife to "Tell Emo [that] Davis did it if I am killed." In response to a question by Moore, Doherty said that Davis was asleep on the couch in the den and that he did not try to take the guns away from Davis because he was afraid he would get shot if he woke Davis. (353 Mass. at 202) (A. 114, 115).

After Moore had gone downstairs, Hayes saw Doherty take the two guns away from Davis, who was sleeping. Both guns were Lugers. Doherty kept one. He gave the other to Hayes and told him to protect his (Doherty's) family. Doherty went downstairs. From the front porch on the third floor Hayes saw two men get out of a cab, one carrying a gun case. About the same time, a car stopped in front of the house and Hayes heard a gunshot on the porch. (353 Mass. at 202, 203) (A. 115).

"Connors" came upstairs, grabbed Hayes by the throat, and pushed him against the wall. Hayes saw no weapon on Connor. Hayes told him, "I'm on your side ... I'm with you. I know nobody." Mrs. Doherty came into the room and said, "Not him; the one on the couch." Hayes heard someone coming up the stairs and also heard "bolt action or shotgun action or something like that." Landry came in and pointed a "rifle" at Hayes. Mrs. Doherty said, "Not him, the one on the couch." Landry "put the gun in Davis'

belly," said "hey, hey" twice, and "shot him in the belly." Mrs. Doherty came running into the room and said, "Get him out of here." Landry and Connor picked Davis up, "one under each arm," dragged him to the doorway and "let him go." Shortly afterwards, Hayes left the premises. He observed blood spattered on the front stairs and passed Davis who was "sprawled out on the front porch." Hayes got into his car, drove around the corner, dropped the Luger into a sewer and went home. (353 Mass. at 202-203) (A. 115).

Moore testified that after the shooting Doherty, his wife, Moore, and Mrs. Baker met in the Baker apartment where it was decided by all, including Moore, that they would tell the police "that two guys came up here and broke in and shot him". Moore said to Doherty, "I'll be a witness for you Billy. I know you didn't shoot him." Doherty called the police. When the police arrived about 3 a.m. on Saturday, May 1, Doherty was on the porch standing beside Davis' body. Doherty told the police that he had been in a fight, had run from the porch and found Davis' body when he returned. Subsequently, the medical examiner reported that Davis died of a shotgun wound in the chest. (353 Mass. at 203) (A. 115, 116).

The district court's findings as to the facts were substantially similar, although less detailed, as those found by the Supreme Judicial Court. (308 F. Supp. at 844) (A. 51). Additionally the district court found that Mrs. Doherty had testified Connor was not present at her home on the night of the crime, and that Connor had not testified but instead had elected to make an unsworn statement to the jury in accordance with the Massachusetts practice at that time. (308 F. Supp. at 844) (A. 51, 52).

Summary of Argument

I. Petitioner argued in the Court, below *inter alia,* that his conviction of murder in the first degree was unconstitutional because he was tried upon an indictment which initially described him as "John Doe, the true name and a more particular description of said John Doe being to said jurors unknown," and which was subsequently amended, on motion of the prosecutor pursuant to the provisions of Mass. Gen. Laws, ch. 277, sec. 19, to reflect his true name. The validity of state indictments are questions of state law and are not the proper subjects for habeas corpus relief. The question presented is one of state law and does not rise to the dignity of a federal constitutional right warranting habeas corpus relief. *Knewel* v. *Egan,* 268 U.S. 442, 446 (1925)

II. The Court below erred in not requiring Connor to exhaust his state court remedies.

There is a need for exhaustion unless a petitioner can show "the existence of circumstances rendering [state] process ineffective to protect the rights of the prisoner" 28 U.S.C. c. 2254 (b).

Since equal protection claims require a finding of state legislative purposes, this circumstance alone required the Court below to remit Connor to the state court as a matter of good judicial policy. Comity requires that the state-federal balance not be subject to unnecessary strains by a failure to make exhaustion a viable policy.

The Court below should not have enlarged its scope of review to decide an issue not alleged as a ground for relief in the petition for habeas corpus and not decided by the federal district court or the state court.

III. A. The Massachusetts statute, as construed by the Supreme Judicial Court requires a court to find probable cause to enter a person's name on the court records. The entry of the name is "decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States,* 333 U.S. 10, 13.

B. Lower federal courts have permitted somewhat lesser changes in name even in the absence of such a broad legislative mandate. *U.S.* v. *Fawcett,* 115 F.2d 764 (3rd Cir., 1940).

C. The state legislature may validly provide for the simplification of criminal pleadings and for the proper functioning of its grand juries. Such purposes are valid and well within the state's power to enact.

D. There is no record support for the finding of the Court below that petitioner was singled out for different treatment.

The Massachusetts statute applies to all types of misnomers in a criminal cases. The classification, therefore, does not concern itself with race, color, national origin, age, sex, political leanings, financial status or any other readily identifiable group. On its face, the statute is a perfectly proper criminal pleading statute. The statute does not, on its face, discriminate against a disadvantaged group.

There is no evidence on this record of any purposeful or intentional discrimination in the statute as applied. Since there is no record support for the court below's conclusion that Connor had been singled out for different treatment by the state nor is there any record support for the conclusion that Massachusetts did not confer benefits with an even hand there was no factual basis on the record to conclude that the Equal Protection Clause had been violated.

Argument

I. A Charging Procedure Which Satisfies State Law and Does Not Violate Any Federally Protected Right Does Not Present an Issue Cognizable in Habeas Corpus Proceedings.

Questions of state law are generally matters for state courts. The Writ of Habeas Corpus is used for the safeguarding of fundamental federally protected rights.

> "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." ...
>
> *Townsend* v. *Sain*, 372 U.S. 293, 311-312. (1963).

In the present state of the law, the grand jury requirement of the Fifth Amendment is not binding on the states by virtue of the Fourteenth Amendment. *Hurtado* v. *People of State of California*, 110 U.S. 516, 538 (1884); *Gaines* v. *Washington*, 277 U.S. 81, 86-87 (1928); See *Beck* v. *Washington*, 369 U.S. 541, 545, 579 (1962); *Malloy* v. *Hogan*, 378 U.S. 1, 4 n. 2 (1964).

The habeas corpus petition alleged that Connor was not indicted by a grand jury and that he had a constitutional right to be indicted by a grand jury (A. 22, 23).

A. *The State Indictment Under Which Respondent Was Tried Was A Valid Indictment Under The Laws Of The Commonwealth Of Massachusetts.*

On August 4, 1965, the Suffolk County Grand Jury returned an indictment against one Landry "and John Doe, the true name and a more particular description of the said John Doe being to said jurors unknown." (A. 71). The indictment was signed by the foreman of the Grand Jury (A. 72). The signature of the foreman indicating that the indictment is a "true bill" is "the proper evidence that it was found by twelve or more grand jurors...." *Turns* v. *Commonwealth*, 47 Mass. (6 Met.) 224, 233 (1843). The indictment or "true bill" was returned, as are all indictments in Massachusetts, by a vote of the grand jury. Thereafter, in this case, as in all other felony cases in Massachusetts, the indictment was "received by the court as an official accusation(s) of the grand jury, and placed upon its files and made a part of its record." *Commonwealth* v. *Smyth*, 65 Mass. (11 Cush.) 473, 476 (1853). Shortly after the return of the joint indictment against Landry and Doe, the respondent was arrested.[2]

---

[2] The respondent's motions in the state court alleged that he was denied the right to be indicted by a grand jury and that his arrest was therefore illegal (A. 86, 88). From the opinion of the Supreme Judicial Court of Massachusetts and the federal district court it appears that the only issue litigated as to the arrest was the question of whether the indictment was valid and proper, 353 Mass. at 205. A reading of the opinion indicates that no statements were taken at the arrest, therefore, no problem arises under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). It appears too, that the witnesses apparently knew the defendant so that there was no problem under *United States* v. *Wade*, 388 U.S. 218 (1967) or *Gilbert* v. *California*, 388 U.S. 263 (1967) (353 Mass. 202) (A. 114). The question of what facts were brought to the chief justice's attention to constitute probable cause was not raised nor was the question of whether the officers had probable cause to arrest. The issue of whether an illegal arrest without any seizure of evidence bars any trials was not raised in this case. Under Massachusetts law, an illegal arrest per se does not bar a court from acquiring

On August 9, 1965, a pleading entitled "Motion to Amend Indictment" was filed and allowed by the Chief Justice which substituted the name of James J. Connor (A. 59, 73). On August 10, 1965, the entry of August 9, 1965 was corrected as follows:

> "Court (Tauro, C.J.) having determined that the true name of John Doe has been discovered to be James J. Connor orders the name James J. Connor to be entered on the record." (A. 59).

The Massachusetts Supreme Judicial Court has held that such an indictment procedure is valid and constitutional under Massachusetts law and does not violate Article 12 of the Declaration of Rights. See *Commonwealth* v. *Gedzium,* 259 Mass. 453 (1927); *Commonwealth* v. *Doherty,* 353 Mass. 197 (1967) certiorari denied 390 U.S. 982; *Commonwealth* v. *Baldassini,* Mass. Ad. Sh. (1970) 989; See also *Commonwealth* v. *Capland,* 254 Mass. 556 (1926).

Thus, the indictment here is a valid indictment in the Commonwealth of Massachusetts.

The writ is not to be used to test an indictment unless it is constitutionally defective. *Knewel* v. *Egan,* 268 U.S. 442, 446 (1925); *Bergemann* v. *Backer,* 157 U.S. 655, 659 (1895).

The lower federal courts have uniformly held that unless

---

jurisdiction. See *Commonwealth* v. *Tay*, 170 Mass. 192 (1898); *Commonwealth* v. *Gorman*, 288 Mass. 294, 300, 301 (1934); *Commonwealth* v. *Miller*, 297 Mass. 285, 287 (1937). See also *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Mahon* v. *Justice*, 127 U.S. 700 (1888); *Frisbie* v. *Collins*, 342 U.S. 519 (1952). Thus the issue presented to the state court was only one of whether this indictment was valid under state law.

Of course, it is equally possible that the officers had ample probable cause to arrest Connor. Hence, Connor chose to rely on his "constitutional right" to be named by a grand jury.

an indictment is so defective as to be constitutionally invalid, an indictment which is valid under state law does not raise a federal constitutional issue cognizable in habeas corpus proceedings. See, e.g. *Cappetta* v. *Wainwright,* 433 F.2d 1027, 1030 (5th Cir. 1970); *Gray* v. *Swenson,* 430 F.2d 9, 14 (8th Cir. 1970); *Johnson* v. *Turner,* 429 F.2d 1152, 1155 (10th Cir. 1970); *Henderson* v. *Cardwell,* 426 F.2d 150, 152 (6th Cir. 1970); *Murphy* v. *Beto,* 416 F.2d 98, 100 (5th Cir. 1969); *Via* v. *Perini,* 415 F.2d 1052, 1054 (6th Cir. 1969); *Mintzer* v. *Dros,* 403 F.2d 42, 43 (2nd Cir. 1967) *certiorari denied* 390 U.S. 1044; *Morford* v. *Hocker,* 394 F.2d 169, 170 (9th Cir. 1968) *certiorari denied* 392 U.S. 944; *Johnson* v. *Beto,* 383 F.2d 197, 198 (5th Cir. 1967).

It is for the state court, short of constitutional infirmity, to interpret its own statutes. *Brady* v. *Maryland,* 373 U.S. 83, 90 (1963); *United States ex rel. Almieda* v. *Rundle,* 255 F. Supp. 936 (D.C.E.D. Pa., 1963) *aff'd* 383 F.2d 421 (3rd Cir. 1967), *certiorari denied,* 393 U.S. 863 (1968).

Since, on this record, there is no evidence nor has there been any showing that Connor lost any benefits, rights or safeguards accorded to others charged with crime but named by the grand jury, the state's interpretation of its statute does not present a constitutional issue.

The allegations of this petition that petitioner had a constitutional right to be named by a grand jury did not present an issue of constitutional law cognizable in federal habeas corpus proceedings. The court below erred in elevating a matter of state procedure to the dignity of a federal constitutional right. See concurring opinion of Mr. Justice Frankfurter in *Paterno* v. *Lyons,* 334 U.S. 314, 322 (1948).

II. The Court of Appeals Erred In Not Remanding the Case to the State Court Because the Respondent Had Never Presented the Equal Protection Argument to the State Court.

In our opinion this is a classic case for the application of the doctrine of exhaustion of state remedies. The question presented is whether a state legislature in enacting a criminal pleading statute had a valid state purpose and whether the state legislature created reasonable classifications. Of course, a state legislative purpose and the construction of state statutes are exclusively state court functions. See, e.g. *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941); *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163-164 (1943); *Younger* v. *Harris,* 1971 —— U.S. ——.

The Massachusetts courts have never been given the opportunity to construe the legislative purpose of this statute in light of an equal protection claim. Thus, exhaustion was very important in order that the state's highest court be given at least one opportunity to consider a claim and make a determination as to legislative purpose and reasonableness of classification. Delicate federal-state relations are certainly subject to an unnecessary strain if a state court is denied the initial opportunity to construe the enactments of its legislature in the light of constitutional challenge.

In our opinion, the Court of Appeals should have required the respondent to raise this claim in the state court. Since the record contains nothing upon which the Court below could find "either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner," (28 U.S.C. §2254(b)) exhaustion should be mandatory.[3]

---

[3] The relevant language was first enacted in 1948. Act of June 25, 1948, ch. 646, § 2254, 62 Stat. 967. Judicial development both

In the absence of such special circumstances, we think that the Court below erred in not following the Congressional mandate or the decisions of this Court that, except in "special circumstances" state petitioners be required to exhaust state remedies.

We realize that such a requirement is based on comity and is not jurisdictional *Ex Parte Hawk*, 321 U.S. 114 (1944). Nevertheless, we think that in the absence of any evidence of delay, oppressive action on the part of the state or other unusual circumstances judicial discretion must be exercised in favor of the rule of exhaustion. We find this reasoning all the more compelling in view of our state's responsiveness to the need for such remedies.[4]

---

before and after the enactment of the statute recognized the special circumstances exception to the exhaustion requirement. *See*, *e.g.*, *Bowen* v. *Johnson*, 306 U.S. 19, 27 (1939); *Fulwood* v. *Stone*, 394 F.2d 939, 942 (D.C. Cir. 1967); *United States* v. *Follette*, 275 F. Supp. 548, 553 (S.D.N.Y. 1967). We read 28 U.S.C. 2254(b) as codifying existing law and not as changing the requirements for habeas corpus relief.

[4] We would point out that the Massachusetts General Court (i.e. the Massachusetts legislature) has not been unresponsive to this Court's request that the states enact legislation providing for post conviction relief. See *Case* v. *Nebraska*, 381 U.S. 336, 337 (1965) (Mr. Justice Clark concurring), p. 346-347 (Mr. Justice Brennan concurring). In 1966 the Massachusetts Legislature removed all time restrictions from the new trial statute. See G.L. c. 278 §29. Thus making this statute, a general post conviction relief statute. See *Earl* v. *Commonwealth*, 356 Mass. 181, 184 fn. 1 (1969); Mass. Adv. Sh. (1969) 963, 965 fn. 1. Massachusetts, of course, still has the writ of error. G.L. c. 250 and the writ of habeas corpus. G.L. c. 248 §1.

Nor has the Supreme Judicial Court been hesitant in enlarging the scope of the writ of error to meet new state needs. The Supreme Judicial Court wrote:

> "Reexamination of the scope of remedies is not unusual, and may be essential, to meet evolving constitutional interpretations. An example of this is the gradual and necessary expansion of the statute writ of error (G.L. c. 250, §§1, 9) as a postconviction remedy broad enough to deal with constitutional problems arising under recent decisions of the Supreme Court of the United States. Compare *Blankenburg* v. *Commonwealth*, 260 Mass. 369, 376, S.C. 272 Mass. 25, 28, with

We also think that where the state's highest court has never considered a state statute in light of an equal protection claim, that this constitutes "special circumstances" in reverse, compelling the federal courts to require exhaustion as a matter of good judicial policy as well as comity.

Secondly as we read the opinion of the Court below, it erred in its understanding of the Massachusetts practice. Clearly, such an error could not have occurred in the state court. The requirement of exhaustion then would have clarified the local practice:

> The requirement rests also upon considerations of practical efficiency. The issues presented often concern local attorneys and court personnel, and arise in a context of local procedures and practices, with which state courts are familiar. They may be resolved most effectively by those tribunals. The requirement serves the interests of the federal courts. "Indeed, any other rule would visit upon the federal courts an impossible burden, forcing them to supervise the countless state criminal proceedings in which deprivations of federal constitutional rights are alleged." Wade v. Mayo, 334 U.S. 672, 679-680, 68 S. Ct. 1270, 1274, 92 L. Ed. 1647 (1948)."
>
> *Rose* v. *Dickson,* 327 F.2d 27, 28 (9th Cir. 1964)

Thirdly, the Court below found as to exhaustion requirement "[P]etitioner presented the court with an opportunity to apply controlling legal principles to the facts

---

Brown v. *Commonwealth*, 335 Mass. 476, 479-480; *Sandrelli* v. *Commonwealth*, 342 Mass. 129, 141-143; and *Letters* v. *Commonwealth*, 346 Mass. 403."
Shoppers' World, Inc. v. *Board of Assessors of Framingham*, 348 Mass. 366, 376, fn. 9 (1965).
See *Cortellesso* v. *Commonwealth*, 354 Mass. 514, 518 (1968).

bearing upon [his] constitutional claim. *United States ex rel. Kemp* v. *Pate,* 7 Cir., 1966, 359 F.2d 749, 751; cf. *Wilbur* v. *Maine,* 1 Cir., 1970, 421 F.2d 1327. That is enough to satisfy the requirement of the exhaustion of the doctrine. *Sullivan* v. *Scafati,* 1 Cir., 1970, 428 F.2d 1023, 1024. N. 1. . . . .'' *Connor* v. *Picard,* 434 F.2d at 674. (A. 6).

A most obvious and apparent distinction between this case and *United States ex rel. Kemp* v. *Pate,* is that in this case, only the state court has the authority to find the State Legislature had a permissible legislative state purpose. In *Kemp,* there was concurrent jurisdiction to determine the voluntariness of a confession. Moreover, in all confession cases, all aspects of the confession should be considered by the reviewing courts (as well as the trial courts). But why should a Massachusetts court decide a federal constitutional issue when the only question before it is whether the statute violates the principles announced in *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329 (1857)? This question is all the more apt in view of the fact that this Court disagreed with *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329 (1857). See *Hurtado* v. *California,* 110 U.S. 516, 521-522.

We note that the Court below found that the Massachusetts Supreme Judicial Court was not "even minimally persuasive'' *Connor* v. *Picard,* 434 F.2d at 676 (A 9). In view of the fact that the equal protection claim was never made to our court, we think this statement is unfair to our highest court. A court, which to our knowledge at least, has always enjoyed a prestigious reputation for judicial excellence, competence and integrity.[5]

We think the Supreme Judicial Court of the Common-

[5] We do not mean to suggest that federal courts must always be "persuaded" by state court opinions. Rather, we suggest that the state courts be given the opportunity to consider the issue so that the federal courts might be "persuaded" by an opinion which is directed at the issue. Nor are we suggesting that the court below meant anything other than the fact that they were "unpersuaded."

wealth of Massachusetts should have been given opportunity to construe its own statute in light of the constitutional challenge.

B. In our view, the court below also erred in impermissibly extending the scope of review in a federal habeas corpus proceeding. Since, the Court below raised the issue of equal protection *Sua Sponte,* it appears to us that the Court treated this claim as "plain error." It is, of course, the federal rule that "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rules Crim. Proc. 52(b). Of course, . . . "[T]he whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Townsend* v. *Sain,* 372 U.S. 293, 311 (1963).

We realize that no particular form of words or phrases is essential to raise a constitutional issue. The only requirement being that the claim and the ground therefor be brought to the attention of the state court with fair precision. This minimum standard was not met in this case.

We note also that the Court below found the opinion of the two dissenting justices more in accord with their own viewpoint. *Connor* v. *Picard,* 434 F.2d at 675 (A 8). The dissenting judges however were not concerned with a constitutional claims based on equal protection. The dissenting justices were concerned with the interpretation of state law. In our view the court below's agreement with the dissenters as to the proper interpretation of state law caused it to impermissibly enlarge its scope of review to general appellate review of a criminal case. *Townsend* v. *Sain,* 372 U.S. 293, 311 (1963). The court below there used Equal Protection Clause as . . . the usual last resort of constitutional arguments to point out shortcomings . . ." *Buck* v. *Bell,* 274 U.S. 200, 208.

Finally, a court of appeals which perceives a constitutional claim not raised in the federal district court should, in our opinion, at the very least, give the federal district court an opportunity to consider the issue and perhaps hold a plenary hearing. See 28 U.S.C. 2254.[6]

We think that the Court below erred in reviewing a claim not presented by the petition for habeas corpus and not raised or decided by the state court or the federal district court. The court below also erred in not requiring Connor to exhaust his state remedies, absent evidence of "special circumstances" to justify bypassing the state court.

> "[T]he relation of the United States and the Courts of the United States to the States and the courts of the States is a very delicate matter."
> *Terminiello* v. *Chicago,* 337 U.S. 1, 11 (1948) Mr. Justice Frankfurter dissenting.

III. The John Doe Procedure Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

In *Snowden* v. *Hughes,* 321 U.S. 1, 11, (1944) this Court wrote:

> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

---

[6] The Court below has, on other occasions, held that "although petitioner may now have exhausted his state remedies with regard to that confession, the claim *must first be raised in the federal district court before we can consider it.*" *Michaud* v. *Robbins*, 424 F.2d 971, 973 fn. 2 (1st Cir. 1970) (emphasis supplied).

Thus, in our view, where state officials *meticulously follow state law*, it is clear that there is no violation of the equal protection clause, absent any evidence to indicate that the statute resulted in an "invidious discrimination" against an individual per se or against any readily identifiable group. The Court below did not find any such evidence. The Court erred in our opinion because it misunderstood the Massachusetts practice. The Court below apparently was unaware of the fact that the substitution of the name had to be by a court. Accordingly, it found that the state procedure as they understood it violated Equal Protection Clause. The Court below misconceived the Massachusetts practice and therefore it reached an erroneous conclusion.

A. A Statute Which Requires a Judicial Finding of Cause Before Entering a Name Is Not Arbitrary.

The court below erred in holding that the John Doe procedure violates the equal protection clause of the Fourteenth Amendment. As we read the opinion, their conclusion was reached on a misconception as to the construction and application of G.L. c. 277 §19.

Under Massachusetts procedure, indictments are returned to court and are a part of the court's records. See, e.g., *Commonwealth* v. *Smyth,* 65 Mass. (11 Cush.) 473, 476 (1853). *Grand Jurors for Worcester County* v. *The Commissioner of Corporations and Taxation,* 329 Mass. 89, 91 (1952).

"The indictment is merely an accusation or charge of crime." *Commonwealth* v. *Woodward,* 157 Mass. 516, 518 (1893). *Commonwealth* v. *Geagan,* 339 Mass. 487, 498 (1959), certiorari denied *sub nom. Geagan, et al.* v. *Massachusetts*, 361 U.S. 895 (1959).

Further, under Massachusetts law the grand jury is considered an appendage of the court. See *Heard* v. *Pierce,* 62 Mass. (8 Cush.) 338, 340-341 (1851); *Commonwealth*

v. *McNary*, 246 Mass. 46, 50 (1923); *Grand Jurors for Worcester County for the Year 1951* v. *Commissioner of Corporations and Taxation*, 329 Mass. 89, 91 (1952).

A Suffolk County Grand Jury returned the indictment to the court signed by the foreman and by the assistant district attorney (A. 72). The indictment charged two persons with a homicide on May 1, 1965, in Suffolk County (A. 71). The name of one defendant was set forth, and the grand jurors stated that they did not know the name of the co-defendant. Shortly thereafter, Connor was arrested for this crime (A. 71, 83).[7] The assistant district attorney then filed a motion in Suffolk Superior Court asking that Connor's name be substituted for the "John Doe" returned by the Grand Jury (A. 73).

The Chief Justice of the Commonwealth "determined that the true name of John Doe . . . to be James J. Connor . . . order[ed] the name of James J. Connor to be entered on the record (A. 59).

---

[7] It should be again noted that the issue of what facts were stated to the Chief Justice has not been litigated in either the Massachusetts courts or the federal district court. Connor's contention has always been that he had a constitutional right to be indicted by a grand jury and that the grand jury lacked evidence of a specific nature as to his identity.

The issue of what information the officers had who arrested Connor has likewise never been litigated. We note that in the hearing before the Chief Justice dated August 9, 1965 the court did state that it had an affidavit that this man was John Doe (A. 84). The precise standard as to the degree of proof required in a grand jury proceeding is not clear under Massachusetts case law. In a long series of cases, our court has held that they will not inquire into the nature, quality and quantity of evidence before a grand jury. *Commonwealth* v. *Galvin*, 323 Mass. 205, 211-212. See also *Commonwealth* v. *Knapp*, 26 Mass. (9 Pick.) 495; *Commonwealth* v. *Woodward*, 157 Mass. 516; *Commonwealth* v. *Lammi*, 310 Mass. 159; *Commonwealth* v. *Ventura*, 294 Mass. 113, 120, 121; *Commonwealth* v. *Walsh*, 255 Mass. 317, 319; *Commonwealth* v. *Baron*, 356 Mass. 362, 364 Mass. Adv. Sh. (1969) 1233, 1237. See also *Costello* v. *United States*, 350 U.S. 359 (1956).

Thus the finding of the court below that there was no cause to

The entry of a defendant's name on such an indictment "stands on the same footing as if the true name of the defendant had been inserted in the indictment when returned by the grand jury." See *Fogg* v. *First National Bank of Boston,* 268 Mass. 25, 28 (1929). The name may only be entered after the *court* makes the necessary findings and also determines that the entry of the name may only be accomplished if "no injustice be done to any defendant." *Commonwealth* v. *Gedzium,* 259 Mass. at 461.

The protection against unfounded accusations is not lost by this procedure. The grand jury has merely invoked the aid of the court as it can do in Massachusetts (See, e.g., *Commonwealth* v. *McNary,* 246 Mass. 46, 50 (1923)) by returning to the court an indictment and asking the court to use its power to bring the defendant to trial, if the court determines the true name of the perpetrator of the crime.

Thus, under the John Doe procedure a judge must find that the accusation is not unfounded both as to the crime and as to the name of the accused.

The statute has been authoritatively construed by the Supreme Judicial Court to require the prosecutor to ask for the substitution of the name. However, it is the court which has the power to substitute a name, and not the prosecutor. See *Commonwealth* v. *Capland,* 254 Mass. 556, 558 (1926); *Commonwealth* v. *Gedzium,* 259 Mass. 453, 461 (1927);

---

place Connor on trial is simply not supported by the record. We would also point out that in the Supreme Judicial Court only the Dohertys contested the sufficiency of the evidence. Connor did not contest the sufficiency of the evidence against him either at trial or in the Supreme Judicial Court, 353 Mass. 197, 202 (A. 116, 117).

The Court below also found that in light of the "Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination." *Connor* v. *Picard,* 434 F.2d at 676. The only statement by anyone on this record as to the extent of this practice is the Chief Justice's comment in the August 9, 1965 hearing that "this was a very common procedure" (A. 79).

Commonwealth v. *Doherty,* 353 Mass. 197, 206 (1967), *certiorari denied* 390 U.S. 982 (1968); *Commonwealth* v. *Baldassini,* 1970 Mass. Adv. Sh. 989, 992.

The procedure permitted here may be analogized to the requirements set forth by this Court in the area of the Fourth Amendment. The prosecutor may not act with the intervention of a "neutral and detached magistrate." The entry of the name is "decided by a judicial officer, not by a policeman or government enforcement agent." See *Johnson* v. *United States,* 333 U.S. 10, 13, 14 (1948); cf. *Coolidge* v. *New Hampshire,* U.S. (slip opinion 5, 6).

Thus, the John Doe procedure does not omit "the indispensable condition that 'the inferences from the facts which lead to the complaint . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' ". *Mancusi* v. *DeForte,* 392 U.S. 364, 371 (1968).

The fact that judicial intervention is required before a person may be named and before the name may be substituted is, we think, a significant difference from the general warrant held invalid in *Commonwealth* v. *Crotty,* 92 Mass. (10 Allen) 403. A difference which this Court at least has always emphasized in the Fourth Amendment cases.

The "John Doe" process does not deprive an accused of the essential elements of his "interest" in grand jury indictment. A "John Doe" indictment and a "name bearing" indictment equally fulfill the purpose of the indictment requirement that a man be indicted by a grand jury "to limit his jeopardy to offenses charged by a group of fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). See *Commonwealth* v. *Cooper,* 264 Mass. 378, 381-382 (1928); *Commonwealth* v. *Bracy,* 313 Mass. 121, 126 (1943). The indictment for murder is in the statutory form which has been held sufficient. See *Commonwealth* v.

Jordan, 207 Mass. 259, 265-268 (1911), *affirmed sub nom. Jordan* v. *Massachusetts,* 225 U.S. 167 (1912). Thus, the petitioner was fully informed of the charges against him. Cf. *Russell* v. *United States,* 369 U.S. 749 (1962).

The indictment here contains all the elements of the offense intended to be charged and apprised Connor of the offense which he must be prepared to meet. The indictment may be pleaded by Connor in bar of further jeopardy. The indictment, therefore, is constitutionally valid.

The Massachusetts statutory procedure does not mean that no cause need be shown before a person stands trial. It merely provides that a grand jury which has investigated a case may make a charge, naming those whose names the grand jurors can ascertain and indicating to the court that they have cause to believe another or others are also involved. Thereafter, the courts must find probable cause to believe that a certain person's name should be entered on the court records. And that in so doing no injustices done to any person, *Commonwealth* v. *Gedzium,* 259 Mass. at 461.

This procedure as enacted by our legislature and construed by our highest court in no way permits "the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant". *Connor* v. *Picard,* 434 F.2d at 676 (A. 9) is an incorrect assessment of the Massachusetts procedure.[8]

---

[8] In our view, footnote 5 also misconceives Massachusetts law. The grand jury foreman has signed an indictment alleging a crime on a particular date and place, and has named an accomplice. The indictment has been returned to a court which must make requisite finding before allowing the substitution. Therefore, the prosecutor is not at liberty to do what he pleases as suggested by the court below. This misapplication of the procedures may, perhaps, have come into being because this issue in this context was not presented to the Massachusetts courts.

Footnote 3 is inapplicable to the instant case. In *Commonwealth* v. *Cooper,* 264 Mass. 378, (1928), the words "wilfully and maliciously" were left. Those words are *essential to the charge* and went

On this record, it is quite clear that it was the court who determined cause, not the prosecutor (A. 59). We think, therefore, that is was this misconception which may have led the Court to reach its erroneous conclusion that the statute violates the Equal Protection Clause of the Fourteenth Amendment.

B. The Manner of Amending the Indictment to Include the Name of the Respondent Was Constitutionally Permissible and Violated No Federal Constitutional Rights.

Courts have uniformly permitted corrections and changes in name (admittedly, the changes were lesser in degree than the instant case but the changes were made without the same legislative mandate.) See e.g. *U.S.* v. *Campbell,* 235 F.Supp. 94, 96 (E.D. Ten, 1964); *U.S.* v. *Fawcett,* 115 F.2d 764, (3rd Cir. 1940); *Dye* v. *Sacks,* 279 F.2d 834 (6th Cir. 1960).

In *U.S.* v. *Fawcett,* 115 F.2d 764, 767, the Court said:

> "... a name is not of the substance of an indictment. And a person may well be indicted, without mention of any name, and designating him as a person whose name is to the grand jurors unknown."

---

to the *core* of whether the indictment charged a *crime*. See *Russell* v. *United States*, 369 U.S. 749 (1962).

Commonwealth v. *Snow*, 269 Mass. 598, 610 (1930) held that the change of the name of the person threatened was not permitted on the ground that a "conviction or acquittal on the indictment as drawn would not be a bar to a new indictment in the form to which it was changed by the amendment." Again, the indictment in which the grand jury has set the charge certainly has sufficient certainty to bar another indictment for the same offense. The respondent has never argued otherwise.

None of the Massachusetts cases cited by the Court below requires a finding that Massachusetts law does not support the interpretation given this statute in *Commonwealth* v. *Gedzium*, 259 Mass. 453, 457, 461 (1927).

Clearly, of course, the Commonwealth needed the legislative mandate, otherwise such an amendment would not be possible in Massachusetts, *Commonwealth* v. *Gedzium,* 259 Mass. at 457. With the statute, and the procedure required before any amendment may be allowed, the following language of *Fawcett* becomes applicable to this case:

> Since the defendant was in no wise misled or prejudiced in any degree whatever by the change and no substantive right affected thereby, it is clear that the name by which he was indicted could have nothing to do with the question of his guilt, the character of the offense, the nature or degree of criminality or punishment attached to it, or with the evidence which should be sufficient to warrant conviction. Therefore the change herein made was only one of form and comes within the meaning of the statutes herein referred to. It was properly allowed. (115 F.2d at 767.)

Tested by those standards, the substitution of Connor's name was not error. The change did not substantially affect the rights of the defendant and the fairness of the proceeding.[9]

---

[9] The state cases on amendment of the name of the accused all appear to be decided as a matter of state law, and not as a matter of federal constitutional rights. See, for example, *People* v. *Erving*, 189 Cal. App. 2d 283, 11 Cal. Rptr. 203 (1961) certiorari denied 368 U.S. 960 (1962) where the California court held that a "Jane Doe (Charlene)" indictment with a mis-description was not held to be error. The state cases are, for the most part, collected in 14 ALR 3d 1358.

The following states have the same or similar statutes to the Massachusetts statute in the instant case. Arizona Revised Statutes Anno. — Rules of Criminal Procedure, Rule 117; Deering's California Codes — Penal Code §953; Idaho Code — Gen. Laws of Idaho Anno., §19-1412; Iowa Code Anno. — §773.8 (formerly §773.7 of Code 1962); West's Louisiana Statutes Anno. — Code of Criminal Procedure, Art. 466; Michigan Compiled Laws Anno., §767.49; Minnesota Statutes Anno., §628.13; Mississippi Code 1942 Anno., §2452; Nevada Revised Statutes, Chap. 173, sec. 105; New Mexico Statutes

In *United States* v. *Skeen,* 126 F. Supp. 14 (W.D. West Virginia, 1954) the federal district court found that an amendment from William H. Marsh to William Howard Morris was not a proper basis for habeas corpus relief. The West Virginia statute was similar to our Massachusetts statute. (See p. 16).

In *United States* v. *Campbell,* 235 F. Supp. 94, 96 (E.D. Tenn. 1964), the Tennessee federal district court found that an amendment changing the name "Bill Campbell" to "Charles Andrew Campbell" was one of "form" cf. *Connor* v. *Picard,* 434 F.2d at 675 (A. 8).

Chow Bing Kew v. *U.S.,* 248 F.2d 466, 468 (9th Cir. 1957) certiorari denied, 355 U.S. 889 (1957) is not authority for the claim that "John Doe" indictments are invalid. In that case the court found that "[S]ince no one is named as committing the crime in the second count, the district court had no jurisdiction in personam to try Chow." The decision was based upon the construction of The Federal Rules of Criminal Procedure, Rule 7(c).

In *Lee Gim Bor* v. *Ferrari,* 55 F.2d 86 (1st Cir. 1932) the Court did not consider it necessary to decide whether a warrant would be sufficient if New York had followed its statutory procedure in amending a "John Doe" indictment because "*no such* amendment or addition as permitted by the *statutes* of that state was had, or is claimed to have been had before the demand relied on was made." Thus, the question of whether the amended indictment would have

---

Anno., Chap. 41-6-10; Consolidated Laws of New York Anno., Code of Criminal Procedure, sec. 277 (repealed as of Sept. 1, 1971); North Dakota Century Code, Chap. 29-11-14; Oklahoma Statutes Anno., 22 §409.3; Oregon Revised Statutes, 132.540 (c); General Laws of Rhode Island, 12-12-2; South Dakota Compiled Laws Anno., 23-32-12; Tennessee Code Anno., 40-1803; Texas — Vernon's Annotated Code of Criminal Procedure, Art. 26.10; Revised Code of Washington, 10.46.060.

been sufficient to support the extradition warrant, had the amendment procedure been followed, was not decided.

In *United States* v. *Doe,* 127 F. 982, 984 (1904) the Court, by way of dictum, held that "an indictment (i.e. "John Doe") thus defective *would not be held void upon collateral attack*; . . ." Legislation is needed authorizing such a procedure but such legislation is not constitutionally impermissible.

The closest case to the present one arose in New York under their Code of Crimin. Procedure — Sec. 277. After the New York courts denied relief the petitioner filed a habeas corpus petition, alleging among other things, that the New York "John Doe" Procedure violated the Equal Protection Clause. The Second Circuit held that:

> The fact that Morrison was under arrest on suspicion when the indictment was handed down is irrelevant since his name was not mentioned to the grand jury and the prosecuting authorities at that time had no evidence to connect him with the crimes. Morrison, who was represented by counsel, made no objection to the amendment, or to the amended indictment at any time during the trial. The right to challenge the sufficiency of an indictment may be lost where the finding of guilt by the trial jury "gives the same or greater assurance against oppression and persecution as an indictment based on sufficient evidence is intended to give before trial has been had." People v. Nitzberg, 289 N.Y. 523, 530, 47 N.E.2d 37, 41. Nor was Morrison denied equal protection of the laws because affirmance of his conviction shows that under like circumstances defendants in other cases would be subject to the same legal rules as were applied in his case.
>
> Order affirmed.

United States ex rel Morrison v. *Foster,* 1949 175 F.2d 495, 497, 498 certiorari denied sub nom. *Morrison* v. *Foster,* 330 U.S. 831 (1946).[10]

C. The Statute Serves Valid State Purposes.

Since a statutory classification may be valid and permissible if it includes "all persons who are similarly situated with respect to the purpose of the law"[11] the question arises, does the law serve any valid purpose?

We think the answer quite obviously is "yes".

The Constitution of the Commonwealth of Massachusetts does not specifically mention indictment by a grand jury. Article XII of the Bill of Rights provides that:

> "No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived

[10] The only distinguishing feature between the Massachusetts case and the New York case (aside from the passage of time) is the fact that no objection was made originally in the New York case. That does not appear to us to be a significant distinction in view of the constitutional issue raised. See *O'Connor* v. *Ohio,* 385 U.S. 92, 93 (1966). Cf. *Terminiello* v. *Chicago,* 337 U.S. 1, 8. (The dissenting opinion of Mr. Justice Frankfurter.)

[11] Tussman and tenBroek, *The Equal Protection of the Laws* 37 Calif. L. Rev. 341, 346 (1949). We recognize that although the rule appears simple, it is exceedingly complex and difficult to apply.

of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

In 1857, The Supreme Judicial Court construed Article XII to mean that a sentence to a state prison, or capital punishment may not be imposed unless the criminal proceedings were commenced by an indictment or presentment of a grand jury. *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329, 342-349 (1857). This Court disagreed and found that indictment by a grand jury was not a constitutional requirement binding on the states and evidently found Judge Merrick's dissenting opinion more persuasive. *Hurtado* v. *California,* 110 U.S. 516, 521, 522, 526 (1883). The *Jones* decision has been extensively reviewed and commented upon in Massachusetts.[12]

The Supreme Judicial Court, in dictum, in 1889 wrote that there was much that could be done in "simplifying indictments" that could be done by the Legislature, except that "it could not authorize the omission of allegations necessary to describe a specific crime." *Commonwealth* v. *Freelove,* 150 Mass. 66 (1889).

The statute was first passed in 1899 as section 8 of Chapter 409.[13]

---

[12] See, e.g. Grinnell, *Grand Juries, The Meaning of the Phrases "The Law Of The Land" and "Due Process of Law,"* And The *Extent Of The Constitutional Powers Of The Massachusetts Legislature To Classify Offenses and Regulate Criminal Procedure*, 6 Mass. L.Q. (No. 5) 214, 224 (1921). See also *Survey of the Grand Jury System* 3 Portia Law Journal 70, 95, 108. See also *The Grand Jury System In Massachusetts*, A Survey, Vol. II, Suffolk University Law Review, 201, 202-203.

[13] The only legislative history we found as to this statute is the following:

In 1897, the General Court of Massachusetts passed a resolve

We think that the proper functioning of grand juries and the simplification of criminal pleadings in a state are valid grounds for a state legislature to enact remedial legislation.

In 1927, Chief Justice Rugg, writing for the Supreme Judicial Court found that the statute did not violate state law because "the grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge. . ." *Commonwealth* v. *Gedzium*, 259 Mass. at 461.

We think Chief Justice Rugg has stated a valid purpose for the law. It should be pointed out that in Suffolk County grand jurors are only sworn for six months G.L. c. 277 §2. The other grand jurors serve for one

---

to appoint three persons "learned in the law to investigate and report upon a plan for the simplication of criminal pleadings, and to prepare a schedule of forms of pleadings to be used in criminal cases." See Resolve, Chapter 85, *Massachusetts Acts and Resolves*, 1897, p. 621.

In 1899, the Commissioners sent their report to the Governor with a draft of a bill. The Governor transmitted both the report and the bill to the Massachusetts General Court. The bill was enacted into law as chapter 409 of the acts of 1899. The present Chapter 272 §19 first appears as c. 409 §8. The Commissioners did not specifically mention c. 409 §8 in their report to the Governor.

As a result of the report chapter 409 was passed. The statutes which were passed for the *first* time in 1899 and incorporated into the revised laws of 1902 and which have been carried forward to this day are as follows: G.L. c. 277 §17; §18; §19; §20; §21; §22; §24; §25; §26; §27; §28; §29; §31; §32; §34; §36; §37; §41.

From the marginal reference on St. 1899, c. 409, §8, it appears that it is founded in part at least upon St. 1895, c. 429, §6, which reads as follows:

> "No plea of misnomer shall be received to a complaint or indictment for violation of any law relating to lotteries, policy lotteries or policy, the selling of pools or registering of bets, or any form of gaming; but the defendant may be arraigned and tried, and if convicted, sentenced and punished, under any name by which he is complained of or indicted. No such com-

year but only at the criminal sittings of the court. G.L. c. 277 §1. These sittings are established by the Chief Justice G.L. c. 212 §14A. (Since the *Gedzium* case, Middlesex County also has six month grand jury sittings. G.L. c. 277 § 2B). Sitting has been held to replace the common law "term." See *Fine* v. *Commonwealth,* 312 Mass. 252, 255 (1942).

This statute permits the grand jurors whose "sittings are infrequent" to discharge their duties and return valid state indictments against those who commit crimes but are able to shield their names from the grand jury within the time period that the grand jurors are meeting. See *Commonwealth* v. *Gedzium*, 259 Mass. at 461 (1927).

In addition, the statute permits a Suffolk County Grand Jury (or Middlesex) to return to the court a joint indictment charging a particular crime and stating that one person's name is unknown to them. This statute permits

---

plaint or indictment shall be abated, quashed, or held insufficient by reason of any alleged defect, *either of form or substance, if the same is sufficient to enable the defendant to understand the charge and to prepare his defence.* No variance between such complaint or indictment and the evidence shall be deemed material, unless in some matter of substance essential to the charge under the rule above prescribed."

Section 8, c. 409 of the Acts of 1899 reads as follows:

"If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name, with an allegation that his real name is unknown, *or by such other description as may be found practicable.*

"If a defendant is indicted by a fictitious or erroneous name, it shall not be ground for abatement, but if in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment."

Sec. 19, c. 218, R. L. modified Sec. 8, c. 49 of Acts 1899 so that it reads like the present c. 277, §19 i.e.: that when his name is discovered it may be added "With reference to the fact that he was indicted by the name mentioned in the indictment."

There have been no further changes in the statute. The Commissioners entire report is found in Documents, The *Senate Commonwealth of Massachusetts*, 1899, 200-357.

this to be done within their short life span. We think this procedure provides the grand jury with the assurance that their investigations will be judicially disposed of according to law, even though they themselves are unable to learn of the name of the perpetrator.

The statute provides a means for one grand jury to complete an entire investigation even though there remains a person whose name is unknown to them and even though the life span of the grand jury is short.

Under Massachusetts law a grand jury "may at any time apply to the court for instructions and invoke its power for aid and protection in the performance of its duties." *Commonwealth* v. *McNary,* 246 Mass. 46, 50 (1923) (dictum).

We think that a statute which assists a grand jury which has completed an investigation and who has been hampered in ascertaining the name of one who committed a crime, ought to be allowed to return such an indictment to the court, if permitted to so do by state law.

Thus in construing that statute as consistent with the provisions of Article XII, the Massachusetts Supreme Judicial Court concluded that the legislature directed its concern to a particular classification, to wit, a classification where the grand jury, although able to conclude that there was probable cause to believe that all of the elements of the crime were present, was unable to determine the perpetrator's name or a description which would readily admit to any degree of particularization. The court further noted that this classification was just and reasonable, lest an undue preference be accorded to the cunning, the discreet, or the disguised, whose actual description could not be reasonably particularized to any degree of certainty. Under the court's interpretation of the statutory provisions, *prompt* and certain justice would befall everyone whose crime the grand jurors investigated.

We point out that the Supreme Judicial Court found in the instant case that "circumstances that require protective custody strongly suggest the risk of intimidation and other improper pressures" of witnesses. 353 Mass. at 211, (1967) (A. 124). Of course, such conduct would support the use of the statute under the reasoning of *Gedzium,* 259 Mass. at 461. We want to make it very clear that we have no knowledge or facts one way or the other that these were the circumstances which "hampered the grand jury in this case." All we are suggesting is that there are valid state reasons for enacting such statutes. This statute serves valid Massachusetts purposes.

D. The Massachusetts Statute Does Not Violate the Equal Protection Clause.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."
>
> *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886).

The equal protection clause of the fourteenth amendment, in our view, prohibits discriminatory administration of valid statutes.

Clearly, the Massachusetts statute on its face is fair and valid. It certainly is within the power of a state legislature to provide courts with a means of correcting misnomers and the like in criminal cases. In *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) the statute on its face made an unequal and unreasonable distinction between penalties for similar crimes. *Skinner,* supra, 316 U.S. at 541-542. The Oklahoma statute as written, therefore, was constitutionally infirm.

As we read the decisions of this Court a statute must be tested on its face and as applied. The decisions require a state to measure its statutes in light of three questions. 1. Does the classification result in discrimination against a disadvantaged class? 2. Does the discrimination relate to an interest that is "basic" or "fundamental"? 3. Does the state's asserted justification withstand "strict scrutiny"? See *Skinner,* supra at 541.

The Massachusetts statutes applies to all types of misnomers in criminal cases. The classification, therefore, does not concern itself with race, color, national origin, age, sex, political leanings, financial status or any other readily identifiable group. On its face, the statute is a perfectly proper criminal pleading statute. The statute does not, on its face, discriminate against a disadvantaged group.

This Court has held that a person has no right to be "indicted by a grand jury." *Hurtado* v. *California,* 110 U.S. 516 (1884). The interest therefore, is not "basic" or "fundamental" as this Court has previously used these words. See also "Developments in the Law—Equal Protection", 82 Harvard Law Review 1120-1123, 1127-1131 (1969).

The state, of course, controls its criminal procedure subject to the Constitution and judicial interpretations. It has a very real interest in the fair and even handed administration of justice. The state also has a strong interest in the efficient administration of its criminal justice system. Therefore, the statute has a permissible purpose and the state has a compelling need for such a statute. Thus, under the "tests" set forth in *Skinner,* the Massachusetts statute is not facially invalid. The Massachusetts statute has no harmful impact on a constitutionally protected interest as did the Oklahoma statute.

The question then arises is the law "administered by public authority with an evil eye and an unequal hand" *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373. A law fair on its

face only violates the equal protection if it is discriminately enforced.

The Court below apparently concluded that Connor was "singled out" for different treatment and that difference not based on any reasonable or permissible purpose. *Connor* v. *Picard*, 434 F.2d at 676 (A. 9, 10).

The record in this Court, and the record which was in the Court below provide no factual support for the Court's conclusion that there was an "arbitrary decision to make such a delegation in petitioner's case." *Connor* v. *Picard*, 434 F.2d at 676. (A. 10). The only fact, if it can be called a fact, as to the frequency of the alternative method of naming an accused, is the statement by the Chief Justice that "this is a very common procedure (A. 79). Compare *Yick Wo*, 118 U.S. at 359 where facts showed "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception . . . were granted." 118 U.S. at 359 with the record in this case. Clearly, no such showing has been made or even attempted to be made in this case.

A person claiming discriminatory enforcement of a penal law must show *purposeful or intentional* discrimination. See *Sunday Lake Iron Company* v. *Wakefield*, 247 U.S. 350, 353 (1918). See also *Edelman* v. *California*, 344 U.S. 357, 359 where this Court recognized "the *necessity of showing systematic or intentional discrimination.*" In the absence of both a claim of intentional discrimination (see petition for habeas corpus A. 17-24) and a showing of systematic or intentional discrimination, there is no basis on this record for a finding that the Massachusetts statute was being administered "by public authority with an evil eye and an

unequal hand.'' *Yick Wo*, 118 at 373. There is no record support for any finding of intentional discrimination in the law as applied.

The Massachusetts statute on its face does not ''lay an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has ''not made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.'' *Skinner* v. *Oklahoma,* 316 U.S. at 541.

Moreover, the record does not support any finding of intentional or systematic discrimination. There is no basis for concluding that a valid law is being unfairly administered. Compare *Yick Wo* v. *Hopkins*, 118 U.S. 356. See generally, Comment, *The Right To Nondiscriminatory Enforcement Of State Penal Laws,* Columb. L. Rev. 1103 (1961).

Does the law violate the Equal Protection Clause? We think not.

Since the classification under the Massachusetts statute does not of course concern itself with race, color, national origin, age, sex, political leanings, financial status or any other readily identifiable group, the equal protection contention should be tested by the following set of ''rules'', to wit (*Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 61, 78-79 (1911).

> ''1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Obviously, if the *Lindsley* "rules" are applied to the Massachusetts statute the reasons stated in *Commonwealth* v. *Gedzium,* 259 Mass. at 461 are adequate to support the classification made by the state statute.

Further, Equal Protection has never meant that the states were forbidden to make any differences in treatment.

In *Graham* v. *West Virginia*, 224 U.S. 616, 630 (1912) this Court wrote

> "The 14th Amendment is not to be construed 'as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. Standard Oil Co. v. Tennessee, 217 U.S. 413, 420, 54 L. ed. 817, 820, 30 Sup. Ct. Rep. 543. A state may make different arrangements for trials under different circumstances of even the same class of offenses (Brown v. New Jersey, 175 U.S. 172, 177, 44 L. ed. 119, 121, 20 Sup. Ct. Rep. 77; Missouri v. Lewis (Bowman v. Lewis) 101 U.S. 22, 31, 25 L. ed. 989, 992; Hayes v. Missouri, 120 U.S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Lang v. New Jersey, 209 U.S. 467, 52 L. ed. 894, 28 Sup. Ct. Rep. 594. . . ."

In *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1957) this Court again upheld reasonable differences in treatment.

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. Cf. *Dominion Hotel, Inc.* v. *Arizona,* 249 U.S. 265; *Great Atlantic & Pacific Tea C.* v. *Grosjean,* 301 U.S. 412; *New York Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535.

Since equal protection does not require identity of treatment, the question arises are the two Massachusetts procedures "so disparate . . . as to be wholly arbitrary." *Walters,* 347 U.S. at 237.

On this record, it is clear that respondent had fallen far short of sustaining his burden of showing that the statutory classification "is essentially arbitrary." Moreover, it is clear — notwithstanding the allocation of the burden of proof — that the statutory classification is in fact reasonable. As noted by the Massachusetts Supreme Judicial Court, the statute assists the grand jury to perform its solemn duty. See *Commonwealth* v. *Gedzium,* 259 Mass. at 461.

There was no foundation in this record to show that petitioner was "singled out" for special treatment.

We realize that the Equal Protection Clause is not merely limited to the protection of existing rights but that it creates a right to equal treatment with respect to any benefit conferred by the state, even if there is no underlying right to the benefit itself. The Court below erred in finding that the "benefits" a finding of cause to place a person on trial and protection against unfounded accusation were lost. *Connor* v. *Picard,* 434 F.2d at 675. Neither

of these benefits are lost under the Massachusetts statute as construed by the Supreme Judicial Court (brief, supra p. 22).

The Court below had no basis for concluding that judicial protection of personal interests rather than the grand jury's protection would be such a "disparate difference" in the treatment of persons as to be "wholly arbitrary."

The Massachusetts statute as applied does not violate the pledge of the "protection of equal laws". *Yick Wo,* 118 U.S. at 369. The Court below's insistence of identity of treatment is, we think, erroneous and not in accord with the decisions of this Court.

We do not read the decisions of this Court as holding that a state statute, fair on its face may be found to violate the Equal Protection Clause, in the absence of evidence in the record that the statute as applied either discriminates against an individual or a class or that an individual or a class has been singled out for different treatment without justification.

Is there any basis on this record to show that Connor suffered "a severe detriment or any detriment" from the application of the statute? Neither Connor's state court motions nor his petition for habeas corpus make any such claim. Indeed, the claim is only "a right" to be indicted by a grand jury. (A. 86, 88).

In *Ah Sin* v. *Wittman,* 198 U.S. 500, 508 (1905) this Court affirmed a dismissal of a writ of habeas corpus on the ground that the defendant had *failed to prove discrimination in the enforcement of the gambling ordinance.*

There is no record support for the Court below's conclusion that Connor was discriminated against by use of this general law.

Moreover, this Court in *Yick Wo,* 118 U.S. at 374 wrote of "*discriminations between* persons in similar *circumstances, material to their right...*"

The record in this case does not support any finding that there was any discrimination against Connor, material to his rights.

Of course, had Connor been able to prove that he "lost material rights" by this procedure, it would have been an abuse of discretion for the Chief Justice to have allowed the motion. See *Commonwealth* v. *Gedzium,* 259 Mass. at 461. Such discretion is reviewable under G.L. c. 278, §§33A-33H (The criminal appeals statute.)

Does the fact that the judge had to order the entry of his name present a discrimination between persons similarly situated, and material to their rights? We think not.

It is ironic to us that the Court below, apparently finds that probable cause on the part of a judge is an "arbitrary decision" although this court has held that probable cause on the part of the prosecutor is sufficient to bring an accused to trial. See *Lem Woon* v. *Oregon,* 229 U.S. 586, 587 (1913); *Ocampo* v. *United States,* 234 U.S. 91, (1914); see also *Beck* v. *Washington,* 369 U.S. 541, 545 (1962).

The record does not show "different treatments ... so disparate . . . as to be wholly arbitrary." *Walters* v. *City of St. Louis,* 347 U.S. 231, 237 (1957).

The record below and in this Court does not indicate that judicial discretion is being exercised with "an evil eye and an unequal hand." *Yick Wo,* 118 U.S. at 373.

Since, there is no record support for the Court below's conclusion that Connor had been singled out for different treatment by the state, there was no basis on which to conclude that the Equal Protection Clause had been violated.

If the basis for invalidating state statutes is to be the theoretical possibility of unequal application, then the states must provide identity of treatment. Since this is not possible nor desirable, this Court has wisely found the clause applicable only if the record supports the claim that the law has been unfairly applied or that a benefit was not conferred with an equal hand.

The application of the equal protection clause by the court below, in the absence of any evidence of unfairness, exalted "form over substance contrary to [y]our previous application of the Equal Protection Clause." See *Beck* v. *Washington*, 1962, 369 U.S. 541, 555.

CONCLUSION

Philip J. Picard, Warden, Massachusetts Correctional Institution, Norfolk, Massachusetts respectfully requests this Court to remand the case to the First Circuit Court of Appeals with directions to reverse its order granting the writ and to direct the Court of Appeals to reinstate the order of the district court denying the respondent's petition for the Writ of Habeas Corpus for the reasons stated in his brief.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General
Chief, Appellate Section
Criminal Division
CHARLES E. CHASE
Assistant Attorney General

GARRETT H. BYRNE
District Attorney

Supreme Court, U.S.
FILED
AUG 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-96

PHILIP J. PICARD,

Petitioner,

v.

JAMES J. CONNOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIRST CIRCUIT

BRIEF FOR THE RESPONDENT, JAMES J. CONNOR

JAMES J. TWOHIG, ESQ.
396 West Broadway
South Boston, Massachusetts

Washington D C THIEL PRESS 202 393-0625

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	(ii)
Cases	(ii)
Constitution of the United States	(iii)
Constitution of Massachusetts	(iii)
Statutes	(iv)
TABLE OF ABBREVIATIONS AND REFERENCE TERMS	(iv)
PRIOR PROCEEDINGS	(v)
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	6
Part I (Relating to the Homicide)	6
Part II (Relating to the Jury Trial)	10
ARGUMENT	12
CONCLUSION	31
ADDENDA–Pertinent Constitutional and Statutory Provisions	1a
ADDENDUM I–Constitution of the United States	1a
Fifth Amendment	1a
Sixth Amendment	1a
Fourteenth Amendment	1a
ADDENDUM II–Constitution of Massachusetts	2a
Part the First, Article XI	2a
Part the First, Article XII	2a
Part the First, Article XIV	2a
ADDENDUM III–United States Code, 28 U.S.C. 2254	3a
ADDENDUM IV–Massachusetts General Laws, Ch. 263, § 4; Ch. 277, § 19, 35A	5a

TABLE OF AUTHORITIES

Cases:

Allis-Chalmers v. The City, 323 F.2d 233 26
Beavers v. Henkel, 194 U.S. 73 . . . . . 13, 19, 20
Bruton v. United States, 391 U.S. 123 . . . . . 28, 30
Commonwealth v. Crotty, 10 Allen 403, 92 Mass. 403 . . . . . 13, 20
Commonwealth v. Doherty, 353 Mass. 197, 229 N.E. 2d 267 . . . . . 14, 18, 19, 28, 30
Commonwealth v. Drew, 3 Cushing 279, 57 Mass. 279 13
Commonwealth v. Gedzium, 259 Mass. 453 . . . . . 16, 17, 18, 22
Commonwealth v. Holley, 3 Gray 458, 69 Mass. 458 . . . . 12, 17, 19
Commonwealth v. Mahar, 16 Pickering 120 . . . . . 17, 21
Connor v. Picard (cert. den.), 390 U.S. 982 4
Connor v. Picard, 308 F. Supp. 843 (1970) 22
Connor v. Picard, 434 F.2d 673, 1st Cir., 1970 . . . . . 14, 19, 22, 23
Duncan v. Louisiana, 391 U.S. 145 . . . . . 13, 31
Ex parte Bain, 121 U.S. 1 . . . . . 13, 17
Fay v. Noia, 372 U.S. 391 . . . . . 15, 16, 22, 23, 24
Gideon v. Wainwright, 372 U.S. 335 31
Hurtado v. California, 100 U.S. 516 . . . . . 13, 14
Jones v. Robbins, 8 Gray 329, 74 Mass. 458 . . . . . 12, 15, 19
Knewel v. Egan, 268 U.S. 442 23
Krulewitch v. United States, 336 U.S. 440 30
Lem Woon v. Oregon, 229 U.S. 586 14
Mancusi v. DeForte, 392 U.S. 364 (1962) 18
Morey v. Dowd, 354 U.S. 457 23
Ocampo v. United States, 234 U.S. 91 14
Pointer v. Texas, 380 U.S. 400 28
Sullivan v. Scafati, 1 Cir., 1970, 428 F.2d 1023 22
Townsend v. Sain, 372 U.S. 293 . . . . . 19, 23
United States v. Fawcett, 115 F.2d 64 23

United States ex rel. Kemp v. Pate, 7 Cir., 1966, 359 F.2d 749 22

Washington v. Texas, 388 U.S. 14 30

Constitution of the United States: 4, 12, 15, 19, 21

Due Process Clause 5, 15, 30, 31

Equal Protection Clause 5, 15, 22, 31

Fifth Amendment 12, 21

Sixth Amendment 28

Fourteenth Amendment . . . . . *passim*

Constitution of Massachusetts: 4, 12, 15, 17, 20, 21, 31

Part the First, Article XI 31

Part the First, Article XII 12, 19, 21, 31

Part the First, Article XIV 21, 31

Statutes:

28 U.S.C. 2254(b) 22

M.G.L. Ch. 263, § 4 . . . . . 13, 17, 21

M.G.L. Ch. 277, § 19 . . . . . 14, 15, 16, 21

M.G.L. Ch. 277, § 35A 21, 23

TABLE OF ABBREVIATIONS AND TERMS

Tr.	Transcript of the Trial by Jury
R.	Summary of Record Prepared by the Trial Court and Used on Appeal in the Supreme Judicial Court
S.J.C.	Supreme Judicial Court
P. and p.	Page
Pp. and pp.	Pages
Mem.	Connor's Memorandum of Law and Fact in U.S. District Court, Connor v. Picard, 308 F. Supp. 843 (1970)
M.G.L. and G.L.	Massachusetts General Laws
Assignment of Errors	List of Complaints and Exceptions Relied on by Connor on Appeal to the Supreme Judicial Court Contained in the Summary of Record
Connor's Brief	The Brief presented by Connor in the Supreme Judicial Court
Picard Brief	The Brief of the Petitioner Picard in the instant case, No. 70-96

NOTE: In the many hearings held in the months prior to the trial and after Connor's arrest (August 6th, 1965 to March 14, 1966), there is no consecutive numbering of the pages or identification of the separate records of each hearing other than by date. In the brief, therefore, the date of the hearing under discussion is first mentioned and there is then a reference by page.

PRIOR PROCEEDINGS

A. 112 - Commonwealth v. Doherty, et al., 353 Mass. 197 Opinion, Supreme Judicial Court of Massachusetts.

A. 50 Connor v. Picard, 308 F.Supp. 843 Opinion, United States District Court.

A. 4 - Connor v. Picard, 434 F.2d 673 Opinion, Court of Appeals, First Circuit.

IN THE

Supreme Court of the United States

No. 70-96

PHILIP J. PICARD,

Petitioner,

v.

JAMES J. CONNOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT, JAMES J. CONNOR

STATEMENT OF THE ISSUES

The foremost issues in this case are as follows:

I. Whether the Respondent was required to be indicted under the Constitution and Laws of the Commonwealth of Massachusetts and of the United States.

II. Whether the amending procedure, even if sanctioned by the Fictitious Name Statute, violated the Respondent's Federal Constitutional Rights.

III. Whether the Respondent has exhausted his state court remedies.

IV. Whether the Massachusetts amending procedure served a valid state purpose.

V. Whether, if said purpose was valid, the Federal Courts were thereby deprived of jurisdiction in habeas.

VI. Whether the Respondent, James J. Connor, was provided with a Full and Fair Trial according to Due Process, the Law of the Land.

STATEMENT OF THE CASE

The respondent, James J. Connor, was convicted of murder in the first degree on March 26th, 1966, in the Superior Court of Suffolk County in Massachusetts.

On August 4th, 1965, the indictment on which Connor was tried and convicted had been returned charging "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," with the murder of Robert W. Davis on May 1, 1965 (R. 41). This indictment also charged a "Donald E. Landry, otherwise known as Emo Landry," with the same crime (R. 41). Both Ronald Hayes and Betty Moore testified before this Grand Jury in the summer of 1965, between June and August, prior to the indictment. Hayes testified in August, prior to the 4th, and Betty Moore testified in August, prior to the 4th, and sometime early in the summer of June (Tr. 1200, 1217, 1218, 1219, 1220, 1221) (Tr. 905, 906, 907, 915, 916, 1029, 1030). Miss Moore admitted telling different stories to the Grand Juries on both occasions on which she appeared before them. The failure of the Grand Jury to name Connor, your respondent, as a defendant in the indictment, either by name or by description, is sufficient

evidence of the nature of Hayes' testimony before it as to whether or not Connor was connected with the murder. On an occasion subsequent to the date of the testimony he had given before the Grand Jury, Hayes was taken to Police Headquarters and asked to identify Connor (Tr. 1218, 1219). Hayes further testified that the first time he saw Connor after the date of the alleged crime was when he was brought to Headquarters after his testimony to the Grand Jury in August of 1965 (Tr. 1212). When questioned as to where he had identified Connor, he said, "Headquarters." He did not testify at any time that he had identified Connor on his previous visit to the Grand Jury. The only date Connor was at Headquarters was August 6, 1965 (A. 76). On that date, two police officers had gone to the apartment of Donald E. Landry and were permitted to enter. A group of people, including two men, the defendant Connor and another man of the same size and stature as Connor, were present. After considerable conversation, both men were taken to police headquarters, where they were held for six or seven hours, without charge. The other man, who had been confined in a penal institution on and after May 1, 1965, was then released, and Connor was taken to Division 11 of the Boston Police Department, in Dorchester, and booked for the murder of Davis (R. 63, 64, 65, 91, 92, August 24, 1965, pp. 1 to 7; A. 81, 82; A. 87, 88; A. 108).

Hayes and Moore were the only witnesses at the trial by jury thereafter who placed Connor at the scene of the crime.

On August 9, 1965, the Assistant District Attorney presented a motion to amend the indictment by striking the name, "John Doe," and substituting the name, "James J. Connor" (R. 57). The only reason advanced in support of this motion was the statement of the prosecutor that, "At the time the indictment was returned, the District Attorney and the Grand Jury did not know the name of the defendant. Since the indictment has been returned, we have

ascertained the name of the defendant" (August 9, 1965, p. 1). This amendment was allowed over the objection of Connor's counsel.

After his conviction, Connor appealed to the Supreme Judicial Court of Massachusetts. In this appeal the issues were raised, (a) that the indictment was a nullity (Connor's Brief, S.J.C., pp. 11 to 14, inclusive; Assignment of Errors, 1, 3, and 4, R. 99); (b) that the indictment, being for a capital offense, could not be amended, even with the defendant's consent, had it been given (Connor's Brief, S.J.C., p. 11, par. 4); (c) that the indictment was unconstitutional under the Constitutions of the United States and of Massachusetts since no probable cause had been shown any one prior to Connor's trial (Connor's Brief, S.J.C. pp. 11, 12); (d) that the indictment was unconstitutional under the Constitution of the United States by virtue of the application under the Fourteenth Amendment of the provisions of the guarantees of the Bill of Rights where fundamental rights are involved (Connor's Brief, p. 13); (e) that Connor was unlawfully arrested on the night of August 6th on the "John Doe" warrant which issued on the void indictment and was arrested without probable cause in violation of the Constitutions of the United States and of Massachusetts (Connor's Brief, pp. 11, 14 and 15; Assignment of Errors 3, 4, and 5, R. 99); (f) that Connor was unconstitutionally denied any access to the minutes of the Grand Jury (Connor's Brief, pp. 15, 16, 17); (g) that Connor was denied due process in numerous other matters, including certain evidence which was declared "admissible" by the Supreme Judicial Court although its exclusion was not "reversible error," even though it was vital on the matters of credibility and motive.

The judgment of the jury court was affirmed by the Supreme Judicial Court on August 22nd, 1967 (229 N.E.2d 267).

Thereafter a Petition for Certiorari was filed in the Supreme Court of the United States (Misc. 942) and denied

on March 11, 1968. In this petition the questions relating to the indictment and Grand Jury minutes were relied upon (390 U.S. 982).

In December, 1968, the respondent, Connor, filed a Petition for a Writ of Habeas Corpus in the United States District Court at Boston. The petition, after hearings, was dismissed on January 16, 1970, and an appeal was filed in the United States Court of Appeals for the First Circuit.

In the petition and the hearings thereon, the issues of unconstitutionality and illegality of the indictment and subsequent arrest under federal and state law were again raised (Petition, Argument Par. 1 and 2, p. 6 and 7), as was the issue of the denial of his fundamental rights according to the law of the land (Petition, Argument Par. 3, 4, 6, 7) described at one point in Connor's "Memorandum of Law and Fact" as including the basic principles incorporated in the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment (Mem. p. 14).

The issues raised in the Court of Appeals by Connor were substantially the same as to the indictment and the denial of a full and fair trial by reason of the violation of his fundamental rights.

On December 10th, 1970 the Circuit Court of Appeals vacated the order of the District Court and ordered the case remanded, the writ to be granted by the District Court. should Connor not be again indicted within a reasonable time in Suffolk County. A mandate issued on December 31st. This Petition for Certiorari on behalf of the Commonwealth seeks to prevent the granting of Habeas Corpus.

STATEMENT OF FACTS RELATING TO THE HOMICIDE

PART I

There was evidence that, on May 1, 1965, in the early hours of the morning, Robert W. Davis was shot in the chest with a 12-gauge shotgun in the apartment on the third floor of the premises at 116 Dakota Street, Dorchester (Tr. 808, 862, 1106, 1380). The body of Davis was found by the police on the porch at 116 Dakota Street at about 3:02 A.M. on that date (Tr. 158, 297). An examination of the body disclosed that a shot had pierced the aorta, resulting in massive hemorrhage, which produced death (Tr. 1385, 1388).

The defendants, William and Janice Doherty, husband and wife, lived in the said apartment with their 4½-year-old son (Tr. 1441-1442). Betty Moore, a witness, had also been living there for a year or two (Tr. 1443-1444).

In the early morning of May 1, 1965, there was a gathering in the kitchen of the said apartment, comprising Ronald Hayes and Betty Moore, who arrived first, and William Doherty, Janice Doherty, Robert Davis and Ronnie Edwards (Tr. 830-831). Previously, all the members of the party had been at the Sportsman's Bar in Dorchester, where Janice Doherty was introduced to Robert Davis for the first time by her husband (Tr. 1452). Various members of the party were eating and drinking beer, and Janice began to cook (Tr. 1457). William Doherty and Robert Davis left the kitchen and went into another room (Tr. 1457). While they were gone, Ronnie Edwards said his friend, Robert Davis, "might be little but he's touch" (Tr. 1458). Janice called her husband and Davis back after a while to eat (Tr. 1459). While the entire group was then gathered in the kitchen, Davis ordered Edwards to "go and get the queen; go and get the payload" (Tr. 1087, 1089, 1136, 1137). Then Davis and William Doherty went out of the kitchen again and, after a while, Davis came back again and said, "I told you, you better get going. Pick up the payload"

(Tr. 1462). He was very mad, and he had a gun in his hand Tr. 1462, 1463). He then went back into another room with William Doherty, whereupon Edwards said that when his friend got mad, he was very dangerous (Tr. 1463). Edwards then left the apartment through the front door, and Betty Moore invited Ronald Hayes into her bedroom (Tr. 834, 1464). Janice Doherty remained in the kitchen (Tr. 1465).

Janice Doherty testified that, shortly afterward, she heard some noise and went into the baby's bedroom (Tr. 1465). The baby was in bed, and Robert Davis was holding two guns, one pointed at William Doherty and one at the baby (Tr. 1466). Davis threatened William Doherty, and the baby awoke and began to cry (Tr. 1467). Janice picked up the baby (Tr. 1468). The two men then left the baby's bedroom (Tr. 1468). Janice went back into the kitchen (Tr. 1470). While she was cleaning, Betty came out of her bedroom, got two bottles of beer from the refrigerator, and went back into her bedroom, without comment (Tr. 1470). Right after that, a man called Paul Sims, a friend of Betty and Ronald, knocked at the front door (Tr. 1471, 1472). He inquired for Betty and was told by Janice that Betty was with Ronald Hayes (Tr. 1472). He said, "All right," and left (Tr. 1472-1473). At this moment, a commotion started in the living room (Tr. 1473). Janice closed the front door, and Betty, who had opened her bedroom door, asked what the confusion was (Tr. 1474). Janice went into the living room and found her husband on the floor (Tr. 1475). Davis had a gun to his head (Tr. 1475). The coffee table was upset, with a leg broken off (Tr. 1475). Janice ordered him out and threatened to call the police (Tr. 1476). Davis pointed the gun at her and said he would blow everybody's head off (Tr. 1476). Janice then went into the baby's bedroom, saw that he was sleeping, and then went to the hall and began to dial the police (Tr. 1477). Davis came into the hall carrying two guns and threatened to blow her head off (Tr. 1478). His face was contorted (Tr. 1478). She went back to the baby's room

(Tr. 1479). Some time later, she made a phone call from Betty's room (Tr. 1498). She took the phone from the hall through the door and told Betty and Ronald Hayes that, "There was a crazy man out there with two guns at my husband's head" (Tr. 1499). Then she dialed Emo on the phone (Tr. 1499). Emo was a friend of her husband and herself (Tr. 1499-1500). She said, "Emo, Emo, this is Janice. Would you please come to my house and help me get this man out of my house? He is crazy" (Tr. 1500). A strange voice responded and told her Emo was not there (Tr. 1501). She hung up and left the room (Tr. 1501). A short time later, Janice went back to Betty's room with the phone and dialed the same number (Tr. 1503). She told the person who answered that Davis still had a gun at her husband's head (Tr. 1504). She said, in the presence of Betty and Ronald Hayes, that she lived at 116 Dakota Street on the third floor (Tr. 1503-1504). The telephone number for Emo was written on a card hung on the wall by the telephone in the hall (Tr. 1529).

Betty Moore testified that on Janice's last call, Janice gave the address of the house, 116 Dakota Street, to the person on the other end of the line (Tr. 845). Some time after the last call, Betty left the apartment and ran down to the front porch as Ronnie Edwards returned in his automobile with another fellow (Tr. 848). Ronald Hayes was still in her bedroom when she left (Tr. 968). Betty testified that he, Ronald Hayes, did not have a gun at that time (Tr. 969). All the other doors on the hall were closed (Tr. 969). Betty was barefooted at the time (Tr. 971). She spoke to Ronnie Edwards on the porch, and he left in his car (Tr. 848). The other man did not leave (Tr. 848). She learned afterward that his name was Delaney, alias Shepard (Tr. 998). Delaney held a gun to her head (Tr. 999). At this point, William Doherty came down the front stairs onto the porch (Tr. 849). Doherty started to fight with Shepard, alias Delaney, and told Betty Moore to get out of there (Tr. 850). She ran down the front stairs, along the side of the house, along Iowa Street to the garage where she stood

between a car and the garage door (Tr. 851). She heard a shot. Then she Delaney run past her along Iowa Street (Tr. 791, 850, 851). On May 15, she sent a letter to William Doherty at the Charles Street Jail (Tr. 993) in which she thanked him for risking his life for hers (Tr. 995).

On cross examination the witness admitted that she ran for her life from Delaney and injured her ankle in so doing (Tr. 997, 999). She and Delaney, the armed man who returned with Edwards (Tr. 848) after Edwards was sent by Davis to fetch the "queen" with the "payload" (Tr. 1087, 1089, 1136, 1137, 1462), did not know each other (Tr. 782, 998).

Some time after Delaney had run past Miss Moore down Iowa Street (Tr. 791) from the porch where he had first encountered her she heard a shot from upstairs (Tr. 851).

Janice Doherty testified that, after Betty left her room to go downstairs to the porch, Janice also left the room to go to the baby's room (Tr. 1486). Ronald Hayes was still in Betty's bedroom (Tr. 1486). While Janice was in the baby's room, she heard a shot downstairs (Tr. 1487). She heard the sound of footsteps from the front stairs (Tr. 1488). Janice went to the front hallway and was pushed aside by two men who went into one of the rooms off the hall, called the den, where Davis was sitting (Tr. 1489). She heard a shot (Tr. 1490). Janice did not recognize the two men (Tr. 1520). She had never seen them before (Tr. 1520). Neither of the men who came into her house at that time was Emo (Tr. 1521). When the men went into the room, Davis had a gun beside him on the couch (Tr. 1546). Janice had known James J. Connor, the respondent, for ten years (Tr. 1547, 1552). He had visited at her home three or four times within the preceding year (Tr. 1547). She did not see James Connor at her home at any time May 1, 1965 (Tr. 1552). He was not one of the two men who went into the room with Davis (Tr. 1552). If she had known the two men, she could have recognized them (Tr. 1553).

Exhibit 40, a picture of the back of the house at 116 Dakota Street, and the garage in the rear, shows a picket fence around the roof ot the garage within the projecting top of the garage. The automobile in the driveway is close to the door of the garage. There is a lintel over the door of the garage and the roof of the garage projects. This exhibit was admitted in evidence as a fair representation as of May 1, 1965, without objection (Tr. 1551).

The defense contended that it was a physical impossibility for anyone standing in the doorway of the garage to see anyone standing on the garage roof, by day or night.

The only witnesses placing James J. Connor at 116 Dakota Street on the night of the alleged murder were Betty Moore and Ronald Hayes.

STATEMENT OF FACTS RELATING TO THE TRIAL

PART II

On several occasions, the witness, Elizabeth Moore, testified that she had never met Robert W. Davis, the deceased, before the night of April 30 and May 1, 1965, the night of the alleged murder (Tr. 830, 831, 933, 937, 992). However, on cross-examination, she admitted that during a police investigation the name of Davis had been mentioned in connection with her own boss (Tr. 991, 992). These admissions were elicited only after considerable evasiveness by Miss Moore (Tr. 990). She had been employed by the University Hospital in the Accounts Receivable Department from February to June, 1965, and her supervisor was one Vincent Murdock, office manager (Tr. 1571-1572).

Murdock was called as a witness by the defense, and there was an offer of proof that he would testify that he had a connection with Miss Moore concerning a robbery (Tr. 1575). On a voir dire, Murdock testified that the holdup took place three days before the killing of May 1, 1965 (Tr. 1578); that Miss Moore was out to lunch at the

time of the holdup (Tr. 1581); that she expressed curiosity, and said she would like to go along to look at pictures at Division 4 to pick out the fellow who committed the holdup (Tr. 1580); that Murdock picked out a picture of Davis as looking like the individual who held him up (Tr. 1579); and that Murdock later discussed with Miss Moore the fact that Davis looked like the man who held him up (Tr. 1579). The Court refused to allow the presentation of this evidence before the jury (Tr. 1581), even though Miss Moore herself had previously admitted that her boss Murdock had connected her with Davis in the robbery (Tr. 991, 992).

Murdock should have been allowed to testify to this effect and further. It was evidence that the murder victim had in fact crossed the path of Miss Moore before the night of the alleged murder, and the interest shown by Miss Moore, who was not even in the office at the time of the holdup, in being with Murdock at the time he tried to pick out the picture of the robber for the police, raises a clear inference that there was some complicity between the alleged murder victim and this important Commonwealth witness. This evidence was excluded at the trial together with whatever light it might have played upon the motives and credibility of the material witnesses although afterwards it was declared to have been "admissible" by the Supreme Judicial Court.

ARGUMENT

I. THE TRIAL OF THE RESPONDENT, JAMES J. CONNOR, WITHOUT PREVIOUS INDICTMENT WAS IN VIOLATION OF THE FOURTEENTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF ARTICLE XII OF THE DECLARATION OF RIGHTS.

The Constitution of Massachusetts, Article XII, provides that indictment on a criminal charge must precede trial by jury and that the Grand Jury must have found probable cause. *Comm. v. Holley*, 3 Gray 458, 459.

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 8 Gray 329, 344.

It has been the contention of the respondent Connor in this case that his case was never brought to the attention of the Grand Jury, that the matter of the probable cause of his guilt was never considered by them, and that he was never indicted. The indictment itself, presented under oath by the Grand Jurors, bears this out. In it the Jurors swear that the identity of the second man involved as a principal in the alleged murder of Robert W. Davis was unknown to them and that they had no description of him. By the use of the words "John Doe" they could only indicate that they had received information that a second man was involved. "John Doe" is not an alias nor a fictitious name in the sense that it was so used by any person. It is not an erroneous name, nor a nickname. It is a legal device for filling a blank, a device which is perhaps justified when accompanied by "any other practicable description," but

by itself it does nothing more than fill out the terms of a general or blank indictment or warrant, the type of document described by Chief Justice Bigelow in *Commonwealth v. Crotty*, "upon which any other individual might have been arrested, as being included in the description, as the defendant himself." 10 Allen 403, 404.

If the indictment in this case be held valid, then it is possible in the Commonwealth of Massachusetts, in defiance of the ancient common law right to be secure from unreasonable arrest or seizure and in defiance of the State law, G.L. 263 § 4, to procure a general indictment for any crime committed and, on unsupported suspicion, to bring any citizen to public trial, identifying him only as he is arraigned by action of the trial court. No probable cause need be shown anyone prior to the public accusation in the dock.

Conceding that there is no general due process right under federal law to require the states to precede trial with indictment, the right to have probable cause established nevertheless remains to be disposed of, and as Massachusetts law provides no alternative procedure in capital cases, indictment is required by the principle of due process as a matter of fundamental right.

The function of the Grand Jury at common law was the determination of probable cause. *Beavers v. Henkel*, 194 U.S. 73, 84. Probable cause or presentment is coupled with trial by jury as common law twin rights indispensable to the states in due process. *Duncan v. Louisiana*, 391 U.S. 145. In *Hurtado v. California*, 100 U.S. 516, indictment is regarded as dispensable in view of the substitution of a system of finding probable cause.

As to the procedure in this case after the presentment of the "John Doe" indictment, if there had been newly discovered evidence, the matter should have been returned to the Grand Jury. *Comm. v. Drew*, 3 Cushing 279; *Ex parte Bain*, 121 U.S. 1.

However, in our case the prosecutor was confronted with the fact that the August, 1965, Grand Jury had already

heard his only two identifying witnesses deny that they knew by name or could describe "John Doe" in any way; otherwise, the Grand Jury should certainly not on its oath declare it had no name or other practicable description. In this sense the process of amendment served well the "prosecutorial convenience" (Aldrich, Chief Judge, Judgment of December 10th, 1970, A. 10).

As to the interpretation of the statute (M.G.L. ch. 277, § 19), it is at least doubtful that it was intended to authorize the issuance of blank indictments and warrants (Dissenting Opinion, *Comm. v. Doherty*, 229 N.E.2d 267, 279, 280).

In *Hurtado*, of course, an alternative method of finding probable cause was provided by state statute.

In *Lem Woon v. Oregon*, 229 U.S. 586, there was an accusation made against the defendant on sworn complaint and an opportunity for examination by him, which he waived. Then, after arraignment, an information under oath was made by the prosecutor. This is quite different from the prosecutor's naked statement that, "Since the indictment has been returned, we (unidentified other than the prosecutor) have ascertained the name of the defendant."

In *Ocampo v. United States*, 234 U.S. 91, an information was filed under oath by the prosecutor with a sworn declaration of investigation and examination of witnesses under oath. The Court then issued warrants, the parties were brought before the Court, the information was read, and the parties were given copies and two days to file an answer to the charges.

None of the procedures dispenses with the necessary probable cause hearing, and all of them seem to provide an opportunity to the accused to be heard therein, which is more than is provided by the indictment process normally.

In none of them is there any suggestion that the accused was treated differently as an individual or as a member of

a class from the generality of others charged with like crimes, either as individuals or belonging in different classifications.

II. THE AMENDING PROCEDURE CONSTITUTED A VIOLATION OF THE RESPONDENT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

We now come to the proposition that the Fictitious Name Statute, M.G.L. ch. 277, § 19, has been construed by the Supreme Judicial Court as authorizing the procedure followed in Gedzium and the amending procedure followed as to Connor, and that being a state law, its construction and validity cannot be challenged in a federal proceeding.

But this construction deprived Connor of his fundamental right under the Massachusetts Constitution to be named in an indictment only after a hearing on probable cause by a Grand Jury. *Jones v. Robbins*, 8 Gray 29. This constituted a denial of due process. Moreover, since indictment is the only process provided for the finding of probable cause in Massachusetts prior to trial, its denial in Connor's case alone was undoubtedly a violation of Connor's federal rights not only as to due process, but also equal protection, under the Fourteenth Amendment, as stated by the Chief Judge of the Circuit Court (A. 6, 7). And whether the statute has been correctly construed or not, the use of the amending procedure resulted in this denial of Connor's constitutional rights.

In *Fay v. Noia*, 372 U.S. 391, at 428, it was said, "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds." The Court continued, p. 429, "The fatal weakness of this contention is its failure to recognize that the adequate state-ground rule is a function of the limitations of *APPELLATE* review." And on page 430, "But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus

jurisdiction of the lower courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter." And on page 432: "While [the Court] has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights."

In Connor's case, his federal rights were denied; the unconstitutional state procedure, whether based on judicial decision or degislative enactment, cannot defeat the intervention of the habeas proceeding.

Nevertheless, the argument of the petitioner Picard is mainly based upon the assumption that the statute relating to fictitious names, G.L. ch. 277, § 19, gives rise to the procedure established in *Commonwealth v. Gedzium* and followed in this case by the Supreme Judicial Court. ("Clearly, of course, the Commonwealth needed the legislative mandate [to amend.]" Picard Brief p. 28). Of course, the statute merely provides that when an accused person has been identified "by a fictitious name or by any other practicable description, with an allegation that his real name (as compared to his fictitious name) is unknown," then something further should be done if his true name is discovered: his true name must be entered on the record and may be used thereafter in the proceedings. There is no provision for a change in the indictment, by motion or amendment or insertion or substitution or any other way whatever; in fact, there must be a further "reference to the fact that he was indicted by the name or description mentioned in the indictment." There is no provision for hearing on probable cause before a judge, a magistrate, or a prosecutor; there is no provision for a finding on probable cause by anyone; and there is no provision for a determination by a neutral judge in place of the Grand Jury "to find probable cause to believe that a certain person's name should be entered on the court records" (Picard Brief,

p. 26). In this statute no change was made in the law requiring, in accordance with the State Constitution, that trial shall be on an indictment (G.L. ch. 263, § 4). "The Manner of Amending the Indictment" (the Picard phrase employed in this case), alleged to be constitutional in Picard's Brief, p. 27, and to have been made possible in the *Gedzium* case (259 Mass. 453) by the statute (Picard Brief p. 28), was neither, as *Gedzium* plainly states, to wit: "It is to be observed that the statute here attacked does not authorize the amendment of the indictment. It is certain that in the absence of an enabling statute an indictment cannot be amended. *Comm. v. Mahar,* 16 Pick. 120; *Ex parte Bain,* 121 U.S. 1. Compare *Comm. v. Holley,* 3 Gray 458. The indictment in the case at bar was not amended. It remains precisely as returned by the grand jury. The record subsequent to the return of the indictment is amplified and made specific as to the real name of the defendant." The entire situation and its consequences to Connor are clearly stated by the Circuit Court (A. 7, 8).

The indictment procedure was therefore not established by the statute but by the *Gedzium* case upon two supports: the first was that "John Doe" is a fictitious name under the statute, the second that the allowance of the "Motion to enter upon the record the true name of the person indicted . . . presupposes the finding by the court of all the facts essential thereto . . . ." No reference is made anywhere in this decision to a "Motion to Amend the Indictment." "John Doe" was regarded as Gedzium's name in a valid indictment. As the Court said, "Some one must be described in an indictment as charged with the commission of crime." *Gedzium,* 156 N.E. 890, 892. The procedure was created as a legitimate device to bring persons to the bar without the cumbersome necessity of satisfying the Grand Jury of the identity of the accused in a hearing on probable cause. This was especially to be avoided when the same Grand Jury had previously heard the two identifying witnesses testify, one of them twice, without getting a shred of identification, by name, nickname, fictitious name, or description.

In Connor's case, however, the Supreme Judicial Court declared, "On August 9 the Commonwealth filed a motion to amend the indictment by substituting the name of James J. Connor for John Doe." 353 Mass. 197; 299 N.E.2d 267. There was no question of an entry on the record here; it was a definite alteration of the indictment, forbidden in matters of substance by the entire body of the law, ancient and modern, including *Gedzium*.

The Court then proceeded, "A hearing was held at which no evidence was introduced. The motion was allowed."

"Thus," says Picard's Brief, p. 25, "the John Doe procedure does not omit the indispensable condition that the inferences from the facts which lead to the complaint be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968).

"The indispensable condition" was then disposed of by means of the *Gedzium* "presupposition" or presumption. Said the Court, "The judge could act on the district attorney's representations. By the presentation of the motion, these were that the man described in the testimony before the grand jury and designated as John Doe was Connor."

Of course, the judge did act, solely, on the district attorney's representations. These were, in their entirety, "At the time the indictment was returned, the District Attorney and the grand jury did not know the name of the defendant. Since the indictment has been returned, we have ascertained the name of the defendant" (Hearing of August 1965, p. 1). Connor's counsel objected, but the motion was allowed.

(Incidentally, the above remarks dispose of the unwarranted conclusion, stated in a footnote on page 14 of the Picard Brief that "it is equally possible that the officers had ample probable cause to arrest Connor." Connor was arrested "in obedience to the within warrant," a John Doe warrant identical in the material part to the John Doe

indictment, August 6, three days before the amendment was offered. No probable cause for the arrest was ever shown, nor has it ever been suggested that anything but the warrant was relied on. A. pp. 74 and 75.)

The comment of the Supreme Judicial Court on this situation was, "While evidence was not required, a statement by the district attorney to make express the implications of the motion, or the presentation of testimony or of affidavits, would have been appropriate and desirable." *Comm. v. Doherty*, 229 N.E.2d 267 at 273.

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." *Townsend v. Sain*, 372 U.S. 293, 316.

The record is plain. There was no finding of probable cause by the Grand Jury against James J. Connor. A. 71, R. 2: Indictment, August 4, 1965. A. 75, Return of the Warrant on Indictment, August 6, 1965.

But in the Commonwealth the proposition that indictment is a prerequisite to trial by virtue of Article XII of the Declaration of Rights has been accepted as well settled. "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until the incriminating evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends." *Comm. v. Holley*, 1855, 3 Gray 458, 459, quoted in *Connor v. Picard*, 434 F.2d 673; *Jones v. Robbins*, 74 Mass. 329, 342-349, 1857.

It is also settled that due process requires that probable cause be found by indictment or otherwise.

"The Grand Jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged. Blackstone says (vol. 4, p. 303): 'This grand jury are previously instructed in the articles of their

inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it.' A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes."

"The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers v. Henkel,* 194 U.S. 73, 84 (1904).

An indictment is the only method by which probable cause may be found in Massachusetts in serious crimes. The failure to indict Connor and the substitution of the amending procedure by the trial court, with no attempt at finding probable cause, deprived Connor of his fundamental rights under the Constitution of Massachusetts in violation of the Fourteenth and Fifth Amendments of the Constitutionof the United States.

As to the collateral issue of the legality of the arrest, the warrant "did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant . . . ." *Comm. v. Crotty,* 10 Allen 403, 404 (1865).

It follows that Connor was required to be indicted in order to be tried, but that he was not so indicted.

III. THE RESPONDENT FULLY COMPLIED WITH THE DOCTRINE OF EXHAUSTION OF REMEDIES

The factual situation as to the indictment and arrest was fully presented in the Supreme Judicial Court on Appeal (Connor Brief S.J.C. pp. 1, 2, 7-9). It was also fully presented to the United States District Court (Connor's Mem. pp. 2-5; Petition for Habeas Corpus, pp. 2-4).

The constitutional and legal issues arising out of the indictment and arrest were also fully argued in Connor's Brief in the Supreme Judicial Court (pp. 10-14) as to probable cause, the absolute limitation on material amendments to indictments in serious cases, the nullity of the indictment as an indictment in blank and the warrant as a general warrant, all involving the violation of Connor's rights under Articles XII and XIV of the Massachusetts Declaration of Rights, the statutes concerning indictments, M.G.L. ch. 266, § 4, ch. 277, § 19, the Fifth and Fourteenth Amendments to the Constitution of the United States. These issues were of course also stated and argued in the United States District Court at length (Connor's Mem., pp. 16-21, 24, 25; Petition for Habeas Corpus, pp. 6, 7).

The illegality of the amending procedure as to indictments under the statutes (G.L. ch. 277, § 19, § 35A), the Massachusetts Constitution, Articles XII and XIV, the Federal Constitution, Amendments V and XIV, and the common law, *Commonwealth v. Mahar*, 16 Pick. 120, was raised and argued in the Supreme Judicial Court (S.J.C. Connor Brief, pp. 10, 11, 12, 13).

In regard to the contention of Picard that the Court of Appeals erred in not applying the doctrine of exhaustion, several erroneous assertions have been made, including two in the first sentence, one direct and another indirectly put (Picard Brief, 16). The assumption is clearly conveyed that Connor based his claim of constitutional violation on the fact that M.G.L. ch. 277, § 19, was unconstitutional. This disregards Connor's argument to the court of final appeal stating that, "It is questionable whether the statute was

ever intended to alter the common law rule in capital cases," and that, "'. . . the provisions of . . . § 19, authorizing indictment by 'fictitious name' or 'other practicable description' were misconstrued as permitting a 'John Doe' indictment, with no description of the accused, in *Commonwealth v. Gedzium*, 259 Mass. 453" (Connor Brief, S.J.C. p. 11 and p. 12, respectively). As regards the statement that the Equal Protection Clause was not invoked before the Supreme Judicial Court, the Fourteenth Amendment was by name specifically relied upon (Connor Brief, S.J.C. p. 13).

Consequently, the doctrine of exhaustion of remedies does not apply. As it was stated in *Connor v. Picard*, 1 Cir., 1970, 434 F.2d 673, "Petitioner presented the court with an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim. *United States ex rel. Kemp v. Pate*, 7 Cir., 1966, 359 F.2d 749, 751. That is enough to satisfy the requirements of the doctrine of exhaustion. *Sullivan v. Scafati*, 1 Cir., 1970, 428 F.2d 1023, 1024 n. 1."

Picard overlooks the fact that the language of 28 U.S.C., Sec. 2254(b) and (c), referring to exhaustion of available remedies makes clear that the remedies must be presently available and open at the time of the entry of the petition for Habeas Corpus. *Fay v. Noia*, 372 U.S. 391, 434.

The Court of Appeals did not err but spoke precisely to the point that Connor had gone to the highest state court with his "constitutional claim."

IV. THE AMENDING PROCEDURE SERVED NO VALID STATE PURPOSE

The purpose relied on by the petitioner Picard in his Brief, page 33, seems to be the "simplification of criminal pleadings." However, the reason stated in *Gedzium* is also quoted on the same page.

The first one is a euphemism for the "prosecutorial convenience" mentioned by the Circuit Court of Appeals

(A. 10). The second is, as the Circuit Court also said, rhetoric substituted for evidence.

The sacrifice of the constitutional right to a hearing on probable cause, which might have saved Connor from a trial on perjured testimony, is too high a price to pay for such meagre returns.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Morey v. Dowd*, 354 U.S. 457, 464.

V. THE FEDERAL COURTS HAVE JURISDICTION TO ADJUDICATE THIS CASE

Fay v. Noia, supra, clearly establishes and describes the compelling reasons that bring this case properly to the Federal Courts for decision on Habeas.

Knewel v. Egan, 268 U.S. 442, cited in Picard's Brief, on pages 10 and 14, was decided at a time when there was a right of review by writ of error; and habeas was adjudged not suited to the contemplation of the tenuous constitutional issues involved. *Fay v. Noia, supra,* at page 412.

As to *United States v. Fawcett*, 115 F.2d 64, cited in Picard's Brief on pages 11, 27, and 28, changes in form and insertions not prejudicial to the constitutional rights of the accused are permitted in lesser than capital cases in the Commonwealth by enabling statute, M.G.L. ch. 277, § 35A. These included misnomers, as in the *Fawcett* case.

"This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights . . . . Where the fundamental liberties of the person are claimed to be infringed, we carefully scrutinize the state court record." *Townsend v. Sain*, 372 U.S. 293 at 316.

". . . [W]e have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in

the state court proceedings." *Fay v. Noia, supra,* at 426, 427.

VI. THE RESPONDENT, JAMES J. CONNOR, WAS NOT PROVIDED WITH A FULL AND FAIR TRIAL UNDER THE LAW OF THE LAND IN ACCORDANCE WITH DUE PROCESS

At the hearing on August 13th, 1965, the matter of the grant jury minutes was first discussed, and it was clearly established that Connor had a particularized need for the minutes not only for the purposes of preparation for trial and for cross examination but also to prove conclusively he was not identified nor considered nor indicted by the Grand Jury. The minutes were indispensable to the presentation of testimony by Connor at a preliminary evidentiary hearing on dismissal.

This need was developed in an argument on bail which revolved about the facts of the case to that point insofar as they led to certain inescapable conclusions about the grand jury testimony.

The prosecutor referred to the facts of the case which required that Connor be held without bail. Connor's counsel pointed out that no facts had been revealed in this case. He declared that the facts as to identification or lack of identification of the person charged before the Grand Jury had not been disclosed and that there was no description in the possession of the officer making the arrest. He asserted that the same witnesses had appeared before the Grand Jury between May 1st and August 4th, the latter date being that of the blank indictment, and that Connor was not connected with the crime until after his arrest on August 6th. He related in detail the circumstances of the arrest, which he implied was illegal, being without probable cause. He stated among other things that Connor did not attempt to flee from the place of arrest, although he had an opportunity. This was the only fact that the prosecutor denied and he then gave that fact as the ground of his

recommendation of no bail. (The denial was not positive, "I wasn't there, but I understand he attempted to flee. Based on these facts [sic], the Commonwealth highly recommends there be no bail.") Connor's counsel then again requested some information from the prosecution justifying anything, bail, arrest, or indictment. The Court then stated justification as follows, "I think the obvious fact is that the grand jury has indicted him for first degree murder." This variant of the colloquial saying, "He must be guilty, or they wouldn't have arrested him," was immediately denied by Connor's counsel, to whom the Court replied in effect that the question of indictment was a matter for trial. The Court, however, then inquired of the prosecutor for the Grand Jury minutes. The prosecutor replied that they were being typed up, that they hadn't been typed. These minutes related to hearings which had taken place in part at least two months before and had concluded nine days before. The Court then asked the prosecutor as an officer of the Court if he would state that Connor's counsel was in error. Whereupon the prosecutor admitted that counsel for Connor was right in certain things but did not specify which. As he had previously denied specifically only the statement that Connor did not flee arrest and that very uncertainly, it is obvious that he was aware that the statements of Connor's attorney as to the evidence before the Grand Jury were correct.

The Court then promised to look at the Grand Jury minutes, if that motion was presented.

At the hearing of August 24th the motion for the minutes was presented. The prosecutor commenced with unsupported statements regarding a campaign of "unabashed terror" by the defendants, all of whom were in custody, against the witnesses. The Court asked for some basis. No basis was given except further wild assertions about additional murders and complete terror. The colloquy between the Court and Connor's counsel indicated that the Court had not inspected the Grand Jury's minutes as yet. The

motion was denied without prejudice. The Court suggested particulars and specifications and that it could not disregard the statements of the prosecutor made in open court. In this discussion the invalidity of the arrest was brought out, and the circumstances surrounding the arrest and the indictment were again shown to prove the particularized need for the minutes of the Grand Jury. The Court persisted in treating the discussion as an attempt to establish guilt or innocence, while Connor's counsel repetitiously asserted the irresistible tendency of the known facts to show lack of probable cause for the indictment and the need for the minutes to establish this conclusion beyond the shadow of a doubt.

On September 15th Connor's counsel argued on a motion for particulars (pages 10 to 16) the particularized need of Connor for certain Grand Jury information to be obtained through the particulars in order to guarantee the defendant his constitutional rights. On all such particulars the motion was denied.

On January 17th Connor's counsel repeatedly requested, in a hearing on a motion to inspect and copy documents, a statement declared by the prosecutor to have been made by a witness as to certain utterances alleged to have been made by Connor at the time of the homicide. Connor's counsel demanded that such a copy of the alleged statement should be given to the defense, implying that the statement had never been uttered before the Grand Jury (pp. 3, 4, 5).

At the hearing of February 9th the necessity of the defense for the minutes was argued again by Connor's counsel (pp. 20-23). A federal case was cited: *Allis-Chalmers v. The City*, 323 F.2d 233.

At the hearing of March 10th, the motion for inspection of the minutes was renewed, and an exception was taken to its denial (p. 18).

At the trial on page 903 the Court, in saying that the defense could not question the witness Betty Moore as to

inconsistent statements made before the Grand Jury unless it first introduced positive evidence of such inconsistent statements, blandly ignored the fact that the Court's action in denying the defense access to the minutes precluded the proof which it demanded, and then called the attempt so to question the witness a "fishing expedition for the purpose of getting the grand jury minutes in evidence here and only for that purpose." By this time it seemed that the primary objective of the Court and prosecution had become the prevention of the public revelation of the testimony contained in the minutes. When counsel for a co-defendant suggested that the Court look at the minutes and then decide whether the questions could be put, the Court immediately foreclosed this by allowing such questioning at once (Tr. 905). After admissions of inconsistent statements, the defense moved for the minutes (Tr. 908). The Court suggested getting the stenographer and refused to give the minutes to counsel. The Court then suggested that the prosecutor give the defense the name of the stenographer (Tr. 909). The prosecutor evaded this, implying that he didn't know the name, but he promised to find out. Of course, this was never done. The Court then instructed the prosecutor to produce the stenographer (after he should find out who the stenographer was) and also the minutes "only in relation to the matter at issue as to this witness." The prosecutor said he would try. He had but "one set" of minutes. Of course, neither any part of the minutes nor the stenographer were ever produced.

The prosecutor later, on another demand, said he would not produce the minutes, but he offered to put the stenographer on the stand to recite the testimony of the witness Moore (Tr. 914).

During the direct examination by the prosecutor of the witness Betty Moore it became material to determine the date when she went before the first Grand Jurly in 1965. The prosecutor refused to admit that he knew the date, and declined to place it more accurately than "either June or July" (Tr. 873).

On September 8, 1965, your respondent filed a motion for the names of the witnesses who had testified before the Grand Jury, as these names had not been endorsed upon the indictment. The Court purported to grant this motion on September 14th but ordered the list "impounded" in the Clerk's office. This was done on October 21st. On November 23rd Connor filed a motion for the addresses of the witnesses, and for an opportunity to interview witnesses in custody. This was denied on February 9th. On January 17th the counsel for Connor complained to the Court that he had been given no list of witnesses. The Court said, "They can't keep the witnesses from you."

Up to the time of trial counsel for Connor never was granted an opportunity to interview any witness in custody or sufficient information to enable him to interview any of the several disinterested witnesses.

This course of conduct on the part of the prosecution and the Court constituted an interference with his fundamental constitutional right to a fair trial under both state and federal law.

The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). *Bruton v. United States*, 20 L. Ed. 2d 476 (1968).

Attorneys for two co-defendants filed motions for particulars and in response on December 13th, 1965, the prosecution filed certain improper and incompetent specifications (R. 9ff, Papers No. 5 and No. 6, Case No. 18314, and R. 29ff, Papers No. 4 and 5, Case No. 19465). In these particulars certain statements purporting to be factual were made as to all four defendants. They were so far from coinciding with the evidence at the trial that, in the case of William Doherty, although their purpose was to establish his guilt as an accessory before the fact, the Supreme Judicial Court was constrained to reverse the conviction of Doherty and direct the entry of judgment for him on that charge.

Aside from the fact that the prosecutor ignored and defiantly failed in these papers, or at any time prior to trial, to furnish certain details requested, e.g., "the means by which the crime was committed," made statements of fact that he never attempted to prove, and was still concealing on December 13th the names of two material Grand Jury witnesses, Betty Moore and Ronald Hayes, referred to as "a third person" and as "other persons who were present," these particulars, which were part of the record and went to the jury with the indictment to be considered and read by them in their deliberations, contained also a most inflammatory description of the homicide, which could not fail to be prejudicial to Connor, since he was positively named as one of the killers in both sets of answers. These particulars were read to the jury by the Assistant Clerk of Court, attending the trial, as parts of the indictments, on the second day, and the reading occupies twenty-three pages of the record, as follows: as to Connor and the co-defendant Landry, three and a half pages (Tr. 56-59), as to the co-defendant Janice Doherty, charged as an accessory, in whose case the particulars were most incendiary and prejudicial, eleven and a half pages (Tr. 60-72), and as to the co-defendant William Doherty, seven and a half pages (Tr. 72-79).

In view of the Court's statement to the jury, at the opening of the session on the third day (Tr. 88-89), that the effect of the particulars when filed is "to bind and restrict the Commonwealth as to the scope of the indictment and the proof offered under it," the failure to take some action, and especially in regard to the particulars as to William Doherty, is incomprehensible except as part of the pattern revealed from the beginning by the refusal to send the case back to the Grand Jury to consider the indictment of the accused James Connor, by the many refusals of the prosecutor to reveal the names of the Grand Jury witnesses, in violation of the established law of the land, by the failure of the prosecutor to produce or the Court to order the production of proof of valid arrest when

such was denied by Connor at many of the preliminary hearings on repeated statements of facts never contradicted by the prosecutor, by the persistent and successful struggle waged by the Court and prosecutor to deny the defendants the opportunity to interview certain material witnesses under appropriate conditions, the exclusion of certain testimony tending to impeach the witness Betty Moore and to demonstrate her involvement in at least two criminal conspiracies connected with the homicide although the evidence was later acknowledged by the Supreme Judicial Court to have been admissible, and by the devious maneuvers and fabrications employed and tolerated to ensure the shrouding of the Grand Jury minutes from the clear eye of inquiry according to due process.

The statements in the particulars were not presented as evidence, but they reached the jury nevertheless in a positive and uncontradicted form. Neither cross-examination nor any other form of testimony was available to contradict them. There were limiting instructions which were not particularly forceful or in any way detailed (Tr. 88-89), which doubtless had even much less than the usual effect. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . . ." (quoted in *Bruton* from *Krulewitch v. United States*, 336 U.S. 440, 453).

The respondent Connor was just as helpless in the face of these declarations as he would have been had a co-defendant's confession involving him been read, as in *Bruton*. And he was harmed thereby in exactly the same manner.

And the remedy, as in *Bruton*, was the granting of the motion for severance, a motion which was denied.

The question whether a right or principle becomes incorporated in the Due Process Clause of the Fourteenth Amendment depends upon whether or not it is so fundamental and essential to a fair trial that its denial prevents the accomplishment of such a trial. *Washington v. Texas*,

388 U.S. 14. *Gideon v. Wainwright*, 372 U.S. 335. *Duncan v. Louisiana*, 391 U.S. 145.

It is the contention of Connor that the foregoing series of actions and rulings on the part of the prosecutor and the trial Court constituted an almost complete deprivation of those fundamental rights which guarantee a full and fair trial and which are the substance of the great phrases not only of the Fourteenth Amendment but also of Articles XI, XII, and XIV of the Massachusetts Constitution, the innumerable violations of which latter are in themselves a breach of federal Due Process and Equal Protection.

CONCLUSION

The respondent requests that the judgment of the Circuit Court be affirmed.

Respectfully submitted,

James J. Connor

By his attorney,

JAMES J. TWOHIG
396 West Broadway
South Boston, Massachusetts
Attorney for Respondent

ADDENDA

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

ADDENDUM I

Constitution of the United States

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDENDUM II

Constitution of Massachusetts

Part the First, Article XI (Declaration of Rights): Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Part the First, Article XII (Declaration of Rights): No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Part the First, Article XIV (Declaration of Rights): Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons,

or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

ADDENDUM III

United States Code

2254. State Custody; Remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State

or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State Court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraph numbered (1) to (7), inclusive, is shown by the applicant, other-

wise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

ADDENDUM IV

General Laws of Massachusetts

Ch. 263, § 4: No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court or in proceedings before a court-martial.

Ch. 277, § 19: If the name of an accused person is unknown to the grand jury, he may be described by a ficti-

tious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent state of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

Ch. 277, § 35A: Upon motion of the district attorney or prosecuting officer, the court may order the complaint or indictment amended in relation to allegations or particulars as to which the defendant would not be prejudiced in his defense.

PICARD *v.* CONNOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 70–96. Argued November 17, 1971—Decided December 20, 1971

A grand jury returned a murder indictment against a named individual "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest the indictment was amended pursuant to state law to substitute respondent's name for "John Doe." The highest state court affirmed respondent's subsequent conviction, rejecting his challenge to the legality of the indictment made on the ground that the amending procedure did not comply with the statute. Respondent subsequently filed a petition for a writ of habeas corpus in the District Court, which dismissed the petition. The Court of Appeals reversed, holding that the procedure by which respondent was brought to trial was violative of equal protection. The court rejected petitioner's contention that respondent, who had not previously raised the equal protection issue, had not exhausted available state judicial remedies as required by 28 U. S. C. § 2254, holding that respondent had presented the state court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Held:* The substance of a federal habeas corpus claim must in the first instance be fairly presented to the state courts, and since on the record and argument before it the State's highest court had no fair opportunity to consider and act upon the equal protection claim, the Court of Appeals erred in holding that respondent had exhausted his state remedies. Pp. 275–278.

434 F. 2d 673, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 278.

John J. Irwin, Jr., Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Robert H. Quinn*, Attorney General,

Ruth I. Abrams and *Charles E. Chase*, Assistant Attorneys General, and *Garrett H. Byrne*.

James J. Twohig, by appointment of the Court, 402 U. S. 993, argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Court of Appeals for the First Circuit, reversing the District Court's dismissal of respondent's petition for a writ of federal habeas corpus,[1] held that "the procedure by which [respondent] was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws." 434 F. 2d 673, 674 (1970). The Court of Appeals acknowledged that respondent had not attacked his conviction on the equal protection ground, either in the state courts or in his federal habeas petition:

> "[Respondent] did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that [respondent] had not exhausted his state remedy . . . ." *Ibid.*

The Court of Appeals rejected that contention and held that respondent had exhausted available state judicial remedies, as required by 28 U. S. C. § 2254,[2] because he

---

[1] 308 F. Supp. 843 (Mass. 1970).

[2] 28 U. S. C. § 2254 provides in pertinent part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is

had "presented the [state] court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" *Ibid.* We granted certiorari to consider that ruling in light of the command of § 2254. 402 U. S. 942 (1971). We hold that the State's objection should have been sustained, and we therefore reverse for further proceedings, see *Slayton* v. *Smith, ante,* p. 53, without reaching the merits of the constitutional question decided by the Court of Appeals.[3]

A Massachusetts grand jury returned an indictment for murder against Donald Landry "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest, the indictment was amended in a proceeding pursuant to a fictitious-name statute, Mass. Gen. Laws Ann., c. 277, § 19,[4] to substitute respond-

---

either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[3] Respondent does not contend that there are no available state judicial remedies through which he can present the equal protection claim. It appears that Massachusetts provides postconviction procedures adequate to adjudicate that claim, either by motion for a new trial, Mass. Gen. Laws Ann., c. 278, § 29; see *Earl* v. *Commonwealth,* 356 Mass. 181, 248 N. E. 2d 498 (1969), or by writ of error, Mass. Gen. Laws Ann., c. 250; see *Cortellesso* v. *Commonwealth,* 354 Mass. 514, 238 N. E. 2d 516 (1968); *Crowell* v. *Commonwealth,* 352 Mass. 288, 225 N. E. 2d 330 (1967); *Shoppers' World, Inc.* v. *Board of Assessors,* 348 Mass. 366, 376 n. 9, 203 N. E. 2d 811, 819 n. 9 (1965).

[4] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall

ent's name for "John Doe." The Massachusetts Supreme Judicial Court affirmed respondent's subsequent conviction, *sub nom. Commonwealth* v. *Doherty,* 353 Mass. 197, 229 N. E. 2d 267 (1967). Among other grounds of appeal, respondent challenged the legality of the indictment. The gist of respondent's argument, which he also asserted during various trial proceedings, was that the amending procedure did not comply with the statute as construed by the Massachusetts courts, with the result that he had not been lawfully indicted for the crime. See *Commonwealth* v. *Gedzium,* 259 Mass. 453, 156 N. E. 890 (1927).[5] The only suggestions of a claimed denial of a federal right were statements in respondent's brief questioning the continuing validity of the holding in *Gedzium* that the provision of the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" was inapplicable to the States. 259 Mass., at 457, 156 N. E., at 891; see *Hurtado* v. *California,* 110 U. S. 516 (1884).[6] We have examined the

---

not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

[5] Although the Massachusetts Constitution does not expressly provide for grand jury indictments, the Massachusetts courts have construed Art. XII of the Declaration of Rights to require that "'no person . . . shall be held to answer for a capital or otherwise infamous crime . . . unless he shall have been previously charged on the presentment or indictment of a grand jury.'" *Jones* v. *Robbins,* 74 Mass. 329, 344–345 (1857).

[6] In arguing his first assignment of error:

"[T]he dismissal in the *Gedzium* case of the applicability of the Fifth Amendment provision . . . would appear to be in need of reexamination, in the light of the development by the United States

pretrial, trial, and appellate papers and do not discover any indication of an attack upon the prosecution under the indictment as violative of the Equal Protection Clause of the Fourteenth Amendment.[7]

Supreme Court . . . of the doctrine of applicability of guarantees of the Federal Bill of Rights to the states by virtue of the Fourteenth Amendment." Brief for Connor in the Massachusetts Supreme Judicial Court 13.

In arguing his third and fourth assignments of error:

"As set forth *supra* in the argument in support of the first Assignment, the indictment of 'John Doe' was a nullity because it was a general indictment, not limited to any identifiable individual. Since this is a capital case, the defendant Connor was prosecuted in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury." *Id.*, at 14.

[7] Nor did respondent's federal habeas petition assert a denial of equal protection. The petition alleges that "[h]e was brought to trial without indictment or presentment in violation of the Fifth Amendment and of the Massachusetts Constitution, . . . [of] the statutory provisions of [the fictitious-name statute], and of the rule of the common law that an indictment in a capital case . . . forbids any amendment to such an indictment." In his memorandum in support of the petition, respondent argued that the Massachusetts indictment procedure "must be administered in accordance with the principles pertaining to the Grand Jury as established by the law of the land, i. e., in accordance with due process as created by the common law and adopted by our Constitution. . . . In accordance with these principles, since the indictment did not name nor describe [respondent], it was, as to him, a nullity, and remained so after amendment." The District Court, noting that respondent had "argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds," 308 F. Supp., at 845 n. 2, considered respondent's contention to be "that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment." The court rejected that contention on the ground "that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment." *Id.*, at 845.

It has been settled since *Ex parte Royall*, 117 U. S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See, *e. g.*, *Nelson* v. *George*, 399 U. S. 224, 229 (1970); *Irvin* v. *Dowd*, 359 U. S. 394, 404–405 (1959); *Ex parte Hawk*, 321 U. S. 114 (1944). The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U. S. C. §§ 2254 (b) and (c),[8] reflects a policy of federal-state comity, *Fay* v. *Noia*, 372 U. S. 391, 419–420 (1963); *Bowen* v. *Johnston*, 306 U. S. 19, 27 (1939), "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson*, *ante*, p. 249, at 250. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr* v. *Burford*, 339 U. S. 200, 204 (1950) (overruled in other respects, *Fay* v. *Noia*, *supra*, at 435–436). It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. See, *e. g.*, *Wilwording* v. *Swenson*, *supra*, at 250; *Roberts* v. *LaVallee*, 389 U. S. 40, 42–43 (1967); *Brown* v. *Allen*, 344 U. S. 443, 447–450 (1953).

We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall*, *supra*, at 251, it is not sufficient merely that the federal habeas applicant has

[8] See n. 2, *supra*.

been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See *Darr* v. *Burford*, *supra*, at 203; *Davis* v. *Burke*, 179 U. S. 399, 401–403 (1900).

Respondent challenged the validity of his indictment at every stage of the proceedings in the Massachusetts courts. As the Court of Appeals pointed out, 434 F. 2d, at 674, this is not a case in which factual allegations were made to the federal courts that were not before the state courts, see, *e. g.*, *United States ex rel. Boodie* v. *Herold*, 349 F. 2d 372 (CA2 1965); *Schiers* v. *California*, 333 F. 2d 173 (CA9 1964), nor a case in which an intervening change in federal law cast the legal issue in a fundamentally different light, see, *e. g.*, *Blair* v. *California*, 340 F. 2d 741 (CA9 1965); *Pennsylvania ex rel. Raymond* v. *Rundle*, 339 F. 2d 598 (CA3 1964). We therefore put aside consideration of those types of cases. The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not.

Until he reached this Court,[9] respondent never contended that the method by which he was brought to trial

[9] The decision of the Court of Appeals prompted respondent, for the first time in any court, to advance the argument in this Court that "since indictment is the only process provided for the finding of probable cause in Massachusetts prior to trial, its denial in

denied him equal protection of the laws. Rather, from the outset respondent consistently argued that he had been improperly indicted under Massachusetts law and, to the extent he raised a federal constitutional claim at all, that the indictment procedure employed in his case could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the States. He adverted to the Fourteenth Amendment solely as it bore upon that submission.[10] The equal protection issue entered this case only because the Court of Appeals injected it.

We are thus unable to agree with that court that respondent provided the Massachusetts "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" 434 F. 2d, at 674. To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts. The Supreme Judicial Court dealt with the arguments respondent offered; we cannot fault that court for failing also to consider *sua sponte* whether the indictment procedure denied respondent equal protection of the laws. Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp* v. *Pate*, 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. See *Sanders* v. *United States*, 373 U. S. 1, 16 (1963). Hence,

---

Connor's case alone was undoubtedly a violation of Connor's federal rights not only as to due process, but also equal protection, under the Fourteenth Amendment, as stated by the Chief Judge of the Circuit Court." Brief for respondent 15.

[10] Respondent reiterated these contentions in his federal habeas petition. See n. 7, *supra*.

we do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." *Daugharty* v. *Gladden*, 257 F. 2d 750, 758 (CA9 1958); see *Kirby* v. *Warden*, 296 F. 2d 151 (CA4 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination. See *Rosé* v. *Dickson*, 327 F. 2d 27, 29 (CA9 1964); *Morris* v. *Mayo*, 277 F. 2d 103 (CA5 1960). The judgment of the Court of Appeals is therefore reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that in this case we carry the rule of exhaustion of state remedies too far. Connor's name was added to the indictment after it was returned by the state grand jury, he being substituted for "John Doe." He raised in his brief before the Supreme Judicial Court of Massachusetts his claim that such a substitution denied him that quantum of due process required by the Fourteenth Amendment "in that he was put to trial without having been indicted by a Grand Jury." [1] He did not refer to the Equal Protection Clause which is also a part of the Fourteenth Amendment. But that is a nicety irrelevant to the maintenance

[1] The Court properly says that respondent tendered the validity of *Commonwealth* v. *Gedzium*, 259 Mass. 453, 156 N. E. 890, to the Supreme Judicial Court of Massachusetts. That, however, was in his first assignment of error. But in his third and fourth assignments of error he alleged that he was prosecuted "in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury."

of healthy state-federal relations on which the Court makes the present decision turn. The concept of due process is broad and expansive, and "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. We have thus held that the denial of equal protection, *viz.*, invidious discrimination, may be "so unjustifiable as to be violative of due process." *Ibid.*[2] As MR. JUSTICE BRENNAN said in *Boddie* v. *Connecticut*, 401 U. S. 371, 388 (concurring opinion), "The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection." That is likewise true here.

Moreover, a due process point is plainly raised where an accused claims that no grand jury found "probable cause" to indict him, that its only finding concerned someone unknown at the time.

If Connor had complained of a coerced confession, or of perjured testimony, and the facts on which he relied

---

[2] The overlap is, of course, not total. *Bolling* v. *Sharpe*, 347 U. S. 497, 499. But the extent to which the two concepts merge has been a subject of debate since Representative John A. Bingham of Ohio, an architect of the Fourteenth Amendment, used the phrases "due process" and "equal protection" interchangeably on the floor of Congress. Cong. Globe, 39th Cong., 1st Sess., 1088–1089. See, *e. g.*, Wilson, The Merging Concepts of Liberty and Equality, 12 Wash. & Lee L. Rev. 182, Antieau, Equal Protection Outside the Clause, 40 Calif. L. Rev. 362, Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341. Compare *Douglas* v. *California*, 372 U. S. 353, and *Griffin* v. *Illinois*, 351 U. S. 12, with *Gideon* v. *Wainwright*, 372 U. S. 335, and *Powell* v. *Alabama*, 287 U. S. 45.

There is apparently a similar controversy in India, whose constitution also contains both a due process and equal protection clause. See, *e. g.*, Narain, Equal Protection Guarantee and the Right of Property Under the Indian Constitution, 15 Int. & Comp. L. Q. 199.

were developed in the state court, the constitutional questions would surely have been sufficiently raised without reference to the precise constitutional provisions involved. The situation here is no different.[3]

---

[3] *Daugharty* v. *Gladden*, 257 F. 2d 750 (CA9), which the Court cites, is instructive. Daugharty was an indigent state prisoner. He appealed the denial of state habeas corpus to the intermediate state appellate court, but that court dismissed the appeal because Daugharty could not afford to supply an appellate transcript. He then moved the state supreme court for an order requiring that he be supplied a transcript free of charge, and when that motion was denied, sought federal habeas corpus. The District Judge denied the application for a writ on the grounds Daugharty had failed to exhaust state remedies. Despite the fact that Daugharty never even mentioned the Fourteenth Amendment, much less the Equal Protection Clause, the Court of Appeals held that his motion in the state supreme court satisfied the exhaustion requirement.

"In moving the Oregon Supreme Court for an order requiring that a transcript be supplied without expense to him, Daugharty called attention to his inability to pay for such a record. This provided that court with all of the facts necessary to give application to the constitutional principle upon which appellant relies. . . . [E]xhaustion of state remedies is not to be denied because the Fourteenth Amendment was not specifically mentioned." *Id.*, *at* 758.

Analogously, the Court of Appeals said in the instant case:

"Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his state remedy, citing Needel v. Scafati, 1 Cir., 1969, 412 F. 2d 761, cert. denied 396 U. S. 861, . . . and Subilosky v. Commonwealth, 1 Cir., 1969, 412 F. 2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel*, nor precedent, as in *Subilosky*, that were not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.' United States ex rel. Kemp v. Pate, 7 Cir., 1966, 359 F. 2d 749, 751; *cf.* Wilbur v. Maine, 1 Cir.,

The judges to whom that issue of law is tendered are learned men who we must assume are knowledgeable as to the meaning of due process. A law student who tendered a brief that left due process at large would certainly not be worthy of an "A." But the nicety of analysis which we associate with scholarship has no functional role to play in this area of exhaustion of state remedies. When we go to that extreme, we make a trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies.

I fear that our reluctance to backstop the Court of Appeals in the present case is symptomatic of this Court's trend to sidestep all possible controversies so, as it hopes, to let them disappear. Of course we should remit a litigant to his state tribunal if facts have emerged which were not known at the time of the trial or if intervening decisions have outdated the earlier state decision. No such situation exists here. The facts are simple and uncontested: Connor's name was substituted for John Doe after the indictment was returned. The point of law is clear now and will be no clearer on the remand. Its vulnerability tested by due process was as obvious when the case was before the Supreme Judicial Court of Massachusetts as it now is. I think the Court of Appeals acted responsibly in ruling on it. We should decide the merits here and now. Endless repetitive procedures are encouraged by today's ruling on exhaustion of remedies. I would bring this litigation to an end today by applying the exhaustion-of-remedy rule to terminate rather than multiply procedures that now engulf the state-federal regime.

1970, 421 F. 2d 1327. That is enough to satisfy the requirements of the exhaustion . . . doctrine. Sullivan v. Scafati, 1 Cir., 1970, 428 F. 2d 1023, 1024 n. 1. We therefore turn to the merits." 434 F. 2d 673, 674.